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NO: 45

First Programme Item IX

TRANSFER OF LAND

LAND REGISTRATION (THIRD PAPER)

7th July 1972

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THE LAW COMMISSION

FIRST PROGRAMME: ITEM IX: TRANSFER OF LAND

WORKING PAPER No. 45

LAND REGISTRATION (THIRD PAPER)

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THE LAW COMMISSION

FIRST PROGRAMME: ITEM IX: TRANSFER OF LAND

WORKING PAPER No. 45

LAND REGISTRATION (THIRD PAPER)

PART A. INTRODUCTION

This is the third in the series of Working Papers on Land Registration which we are publishing for comment and criticism. In it we deal with two topics, identity and boundaries (in Part B) and rectification and indemnity (in Part C).

Our first Working Paper on Land Registration (No. 32) was published in September 1970 and the second (No. 37) in July 1971. The introduction to the first Paper (Part A) was intended as a general introduction to the series and in it we gave a brief description of the Land Registration system and its history and objectives.

We have reached certain provisional conclusions on the two topics discussed in this Paper and a summary is set out in Part D at pages 72 to 74 . Comments on our provisional conclusions are invited.

PART B. IDENTITY AND BOUNDARIES

Introduction

1. The accurate identification of land, and in particula its boundaries is often an important matter to an owner of land and to those to whom he may wish to sell, mortgage or let it. To a great extent the law in this field is the same whether the title to the land is registered or unregistered. It is perhaps significant, therefore, that one of our correspondents, a public body, told us that in practice it had found the identification of boundaries "at times equally difficult under both systems". We quote this comment, not only because it seems to show some dissatisfaction with the manner in which registered land is identified, but also because it brings out an important point which may not be generally appreciated. It is that in regard to both registered and unregistered land the exact position of the boundaries is usually left undetermined.

2. By no means all of those who have written to us are dissatisfied with the method of identifying registered land. Indeed, a strong and informed body of opinion considers the system is, in this respect, as satisfactory as it can be without becoming unnecessarily elaborate and expensive both in time and money. Nevertheless, a significant number of individuals and organisations have expressed dissatisfaction with certain aspects of the matter.

3. This dissatisfaction stems, in part, we suspect, from disappointment at finding, contrary to expectation, that registration of title does not always provide a complete answer to the problems which can arise in relation to unregi tered land when trying to ascertain the exact position of boundaries and ownership of boundary features from the description and plans used in "unregistered" documents of title.

4. The most important aspect that has been criticized is that under our system of registration of title, registration is almost invariably with "general boundaries" - an expression which, for present purposes, means that the exact line of the boundary is left undetermined. Other points of criticism are perhaps less fundamental and of these some, such as those relating to the scale of plans used by the Registry, are matters primarily of administration and therefore outside our present terms of reference.

Unregistered land

5. Before discussing the identification of registered land it is necessary to consider how unregistered land is identified, since, as we have already mentioned, in many respects the law applying to both systems is the same. Moreover, on an application for first registration of a title following a sale, the Registry is in no better position than a purchaser of unregistered land because it has presented to it the same documentary title and other evidence as was presented to the purchaser by his vendor.[1]

6. The precise line of the legal boundaries of a particular property (and so whether or not a boundary feature is, or is not, included in the property) depends on the facts of the case. Where there are physical features on the ground, such as walls, fences and buildings, these, coupled with the description in the paper title, may indicate clearly the situation of the boundaries. But there may be no such features or the features (which by themselves can give rise to rebuttable presumptions only) may not be adequately supported by verbal description showing exactly how they relate to the boundary line.

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1. The Registry has, however, at its disposal an experienced Plans staff who will compare the deed plan with the Ordnance Survey Map and consider other relevant information and, if there appear to be discrepancies, will arrange for a survey to be made.

7. The system of conveying land by private documents has been criticised because, however efficiently the conveyancing may have been carried out, it may be impossible to ascertain from the paper title the exact dimensions and boundaries of a particular piece of land. The documents may show an impeccable title to some land, in a particular district, but to precisely what land may be in doubt. There are a number of reasons for this, but the principal one is that in England and Wales, speaking generally, the boundaries of land in different ownerships have not been settled on the ground, either by agreement or by judicial or other determination. In some countries, boundaries have been settled and marked out on the ground by a process of adjudication. In others, particularly in parts of the Commonwealth, the problem may be simplified by the fact that the title to the majority of the land commences with relatively recent grants from the Crown or government in which the boundaries of all the land in a particular area are accurately and clearly defined. A conveyancer in this country, who wishes to be absolutely precise as to boundaries, is thus faced with the impossible task of defining in a document something which has not been determined on the ground.[2] Solicitors acting for vendors, mortgagors and lessors have for that reason generally advised that it is only possible to describe the land in the deeds in qualified terms and the other party to the transaction has consequently to acquire his interest in the land on those terms. In successive dispositions areas and dimensions will often be stated to be of a particular number of acres or feet "or thereabouts"; and plans, when used, are frequently expressed to be "for the purposes of identification only".[3] Absolute precision is thus avoided in order that land to which the disponer has no title is not included in a disposition.

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2. Unless there has been a recent accurate survey, for example, in the case of a newly developed estate.

3. Under The Law Society's Conditions of Sale (1970 ed. General Condition 12) the vendor is not required to define exact boundaries, fences, ditches, hedges or walls. The National Conditions of Sale (18th. ed.) contain a condition having a similar effect. (General Condition 12).

8. Other reasons for difficulty in identifying the boundaries (both legal and physical) of unregistered land from the paper title are, we think, mainly caused by problems in relation to plans (or the absence of plans). By way of example:-

(i) The plan used may be inaccurate in that it cannot be reconciled with the situation on the ground. The Chief Land Registrar has indicated that there are inaccuracies in a large number of the plans used in connection with first registrations or transfers of part.[4]

(ii) The plan, though accurate in portraying the extent of the property may not enable the position of the property to be fixed in relation to surrounding properties. In relation to small rectangular residential plots these have been aptly described as "floating rectangles".[5]

(iii) No plan may have been used and the property may have been described in the documents by little more than its postal address. Such a description would, clearly, not enable an unfenced boundary to be identified.

Registered land

9. On first registration of the title to a piece of land the applicant for registration will complete his purchase in the same manner as a purchase of unregistered land and will thereafter lodge at the Registry all the relevant documents of title including that conveying the land to him. The

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4. Ruoff, Concise Land Registration Practice, 2nd.ed. p.28

5. (1965) 62 The Law Society's Gazette p. 342. (Ruoff).

Registry will then have, in relation to the documentary title adduced, precisely the same information as to identification as the purchaser had himself; and accordingly will inherit any imprecision in identifying the legal boundaries which exists in the unregistered title.[6] This is one of the reasons why the registration of title to land is usually made with general boundaries. Were this course not adopted, then unless each of the boundaries were fixed with the agreement of all the adjoining landowners the registration of a property might result in those landowners being prejudiced by the inclusion in the registration of part of their land. There is a procedur for fixing boundaries, and we shall discuss it later; but it is very rarely used and the overwhelming majority of properties which are registered are registered with general boundaries. Registration with general boundaries does not mean that no attempt is made to record the boundaries. On the contrary "the Registry portrays as accurately as possible on its maps the position of physical features, including boundary fences, hedges and walls and where none such exist reproduces the boundaries depicted on the conveyance or transfer plan with all available detail."[7] Clearly, it is desirable that the plan and description of the property in the conveyance to the applicant for first registration[8] should be as accurate and detailed as possible.[9] The exact position of the boundaries of a property registered with general boundaries, is not, however, "guaranteed".

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6. The Registry has, however, access to records which may not have been available to the purchaser.

7. Registered Land Practice Note No. 27. Registered Land Practice Notes are published by The Law Society. (See para. 13 below).

8. Accuracy in relation to plans is equally important where registered land is being subdivided.

9. Where appurtenances, such as cellars or areas, would have passed under a conveyance of unregistered land (Law of Property Act 1925, s. 62) registration of a person as proprietor of registered land vests those appurtenances in him. (r. 251).

Registered and unregistered land

10. It will thus be seen that in relation to both registered and unregistered land the precise identification of the land is usually not attempted in the documentary title and any plans appertaining to the title. Such identification is possible only if two conditions are satisfied. First, the boundaries must be exactly ascertained on the ground before they are recorded. Secondly, if the boundaries are afterwards to be ascertainable on the ground from the deeds and plans, they must be capable of being reconstructed if the existing physical features on the ground (if any) were removed or obliterated.

Registry plans based on Ordnance Survey Maps

11. Although the Act[10] permits registered land to be described in the register by three different methods, the current practice is almost invariably to do this by means of a short verbal description and a filed plan which is based on the Ordnance Map. The scales vary according to the area in which the land is situated, but that most commonly used is 1/1250[11] (approximately 50 inches to the mile). Regard is to be had to ready identification of parcels, correct descriptions of boundaries and, so far as may be, uniformity of practice.[10] The boundaries of all freehold land and all requisite details are, wherever practicable, to be entered on the register or filed plan. The filed plan is to be used for "assisting" the identification of the land.[10] In Appendix A we reproduce

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10. Land Registration Act 1925, s. 76.

11. Other scales currently used by the Registry are 1/2500 for agricultural, cultivated or undeveloped land and 1/10,000 or 1/10,560 for very large areas such as mountains and moorland where development is unlikely.

a copy of the entries in the register and filed plan relating to a fictitious freehold title. The verbal description is contained in Part A (the Property Register) and this refers the reader to the filed plan. The plan is an essential part of the system of identifying registered land; it is primarily at it that the proprietor or a purchaser will look if he wishes to ascertain the identity and extent of the land. Nevertheless, although he will see an accurately produced plan, he will not generally be able to ascertain the precise boundaries of the land from it.

12. It has also to be borne in mind that the Ordnance Survey Maps on which filed plans are based, although extremely accurate, are topographical maps. They do not, therefore, purport to show where the legal boundaries between properties in different ownerships run. The boundaries shown are the physical boundary features and these do not necessarily coincide with the legal boundaries. For example, it is the universal practice of the Ordnance Survey where there is a hedge or fence running along a parcel of land to survey the hedge or fence for the purpose of delineating the parcels and to take the measurement from the centre line so as to ascertain the acreage. Courts can take notice of this practice of the Ordnance Survey as at least prima facie evidence that, in such cases, the boundary line on the map indicates the centre of the hedge.[12] The fact that a hedge or fence is shown in a particular place on an Ordnance Map is in itself no evidence of what is the true boundary.[13]

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12. Davey v. Harrow Corporation [1958] 1 Q.B. 60 at 69.

13. Fisher v. Winch [1939] 1 K.B. 666(CA). Ordnance Survey Act 1841, s. 12. As to the "hedge and ditch" rule in relation to registered land, see Registered Land Practice Note. No. 13, the text of which is set out in Appendix C.

Practice Notes and Leaflets

13. There are many matters in relation to title registration which are essentially matters of practice and for which the Act and Rules make no specific provision. In particular, this applies to questions relating to the identity and boundaries of registered land, and plans. Some of these questions are dealt with in "Registered Land Practice Notes" published by The Law Society as the result of the decisions reached at meetings of the Joint Advisory Committee of The Law Society and the Land Registry. These notes have no binding effect, but they serve a useful purpose in providing guidance on problems which are liable to arise in practice from time to time. We were surprised to find, however, that a number of our solicitor correspondents were unaware of their existence. Practice Notes which are relevant to the subject matter of this part of this Paper are listed in Appendix B and those numbered 12, 13 and 34 we set out in full in Appendix C with the permission of The Law Society and the Chief Land Registrar. Practice Leaflets for the guidance of applicants are also issued from time to time by the Land Registry.

The case for general boundaries.

14. One of the advantages claimed on behalf of registration of title in England and Wales is that there is provided "an accurate plan based on the latest revision of the Ordnance map identifying the land".[14] That claim is justified, so long as it is clearly understood that the identification referred to is general. Without that qualification the statement may give the impression that the plan bound up with a land certificate precisely defines the legal boundaries of the property. As we have already said, this is not the case except in those very rare instances where the boundaries have been fixed. What we now have to consider is how far it is desirable or practicable for the boundaries of registered

14. Registration of Title to Land (Pamphlet published by H.M.S.O. 1971).

land to be precisely defined. This is by no means a novel topic. On the contrary, it is one on which there has long been discussion and controversy both here and in the Commonwealth. It is best approached, we think, by looking at its history in England and Wales. Writing in 1937 a former Chief Land Registrar, Sir John Stewart-Wallace, said:-[15]

> "In England itself we have, during the last century, boxed the compass on the point. We have swung from meticulous accuracy in defining the registered parcels, cost what it might in money and hostility between land owners, to the theory that it was no part at all of the business of registration of title to ascertain and guarantee by plan or otherwise the parcel of land, the title to which was registered and guaranteed."

15. Under the Land Registry Act 1862 (the Act which introduced registration of title) absolute precision was insisted upon in relation to the identity of land about to be registered. Section 10 of that Act provided:-

> "The identity of the lands with the parcels or descriptions contained in the title deeds shall be fully established and the Registrar shall have power by such inquiries as he shall think fit to ascertain the accuracy of the description and the quantities and boundaries of the lands; and,... a map or plan shall be made and deposited as part of the description."

The effect of that provision in practice has been graphically described by Sir John Stewart-Wallace as follows:-[16]

> "..... no estate was registered under the 1862 Act before the service of notice on adjoining landowners and an official perambulation of the ground fixing the property boundaries exactly. As a result of this official perambulation, a plan was prepared by the registry on which symbols were inserted on the external fences or other physical features to show

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15. Principles of Land Registration p. 60.

16. ibid. p. 64

whether or not the property boundaries coincided with them. If they did not coincide, it was shown whether the property boundaries were inside or outside the physical boundaries; if necessary, the exact difference between them was indicated by figured dimensions on the plan. In this way the plan was made the master. It became conclusive evidence as to the property boundaries, freeing them from all dispute, dormant or otherwise.

This was heroic, going as it did far beyond what occurred in an ordinary sale, but, as a step towards the simplification and cheapening of land transfer, the forcing of every landowner who applied for registration and his neighbours to fight for their rights to the last inch or for ever after keep silence, was out of the frying pan into the fire. So complete was the failure that, six years after the passing of the Act, a Royal Commission was appointed to enquire into the causes of a breakdown so glaring."

16. The Commissioners, who reported in 1870, found that one of the probable causes of the breakdown was the necessity of accurate definition of boundaries. They heard evidence as to the difficulties which were being encountered and the two principal ones were described in their Report as follows:-[17]

"First, notices have to be served on adjoining owners and occupiers which may and sometimes do amount to an enormous number, and the service of which may involve great trouble and expense. Messrs. Sewell & & Co. told us that in one case they had to serve 135 notices. Mr. Jarrett shows that in one of his cases he had serious difficulty in finding the persons on whom notices had to be served. This is the first mischief. The second is that people served with notices immediately begin to consider whether some injury is not about to be inflicted upon them. In all cases of undefined boundary they find that such is the case, and a dispute is thus forced upon neighbours who only desire to remain at peace."

The Commissioners then went on to give some extracts from the evidence to show that these were not imaginary mischiefs. Also in the Report appears the following passage:-[18]

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17. para. 45

18. para. 80

> "It is clearly very onerous to the registering owner and it seems very vexatious to others, that they should be compelled to watch a legal process, and perhaps to adjust an undefined boundary because one of their neighbours wants to register his title."

Accordingly, the recommendation of the Commissioners was that no attempt should be made to define boundaries on an application for first registration, but that the applicant should merely be required to furnish the best description he could, whether verbal or pictorial. Section 83(5) of the Land Transfer Act 1875 gave statutory effect to that recommendation by providing that:-

> "Registered land shall be described in such manner as the Registrar thinks best calculated to secure accuracy, but such description shall not be conclusive as to the boundaries or extent of the registered land."

In that provision was contained the germ of the general boundaries rule as we now know it.

17. Section 83(5) of the 1875 Act was repealed by the Land Transfer Act 1897 and the relevant provision as to general boundaries was put into the Land Transfer Rules 1898. Rule 213 was as follows:-

> 213. Except in cases in which the fixed boundary of the land has been thus[19] ascertained, the map shall be deemed to indicate the general boundaries only. In such cases the exact line of the boundary will be left undetermined (as for instance whether it runs along the centre of a wall or fence, or its inner or outer face, or how far it runs within or beyond it; or whether or not the land registered extends to the centre of an adjoining road or stream). When a general boundary only is desired to be entered in the Register, notice to the owners of adjoining lands need not be given.

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19. i.e. under the provisions of the preceding rules which dealt with the fixing of boundaries.

18. In 1903 the Rules were amended and consolidated. Rule 213 of the 1898 rules was reproduced with only very minor amendment; but an additional sentence was added.[20]

19. The question of the definition of boundaries of registered land was one of the matters considered by the Committee on the Transfer of Land in England and Wales under the chairmanship of Mr. Leslie Scott K. C. In their Report,[21] published in 1919, they recommended that as a general rule registered land should be described by reference to a plan, and that such plan should show the general boundaries of the property. The Report states:-[22]

> ".....it should be noted that in rural districts it is often more difficult to define the exact boundary of a property than is the case in urban districts. It is often found that the ownership of a physical boundary, such as a hedge or ditch, is not apparent from any documentary evidence, and has never been decided, and the ownership of roadside wastes and land abutting on commons is often open to dispute. This point would become of greater importance if registration were to become compulsory for rural districts.
>
> Under the existing system the Ordnance Maps, on which the filed plans are based, show only the physical boundaries, which are not always identical with the property boundaries. Dimensions are only shown on the Land Registry plan where the property boundaries are imaginary. This practice appears to us to be correct, and, in our opinion, should be continued."

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20. The additional sentence was as follows:-

> "This rule shall apply notwithstanding that a part or whole of a ditch, wall, fence, road, stream or other boundary is expressly included in or excluded from the title or that it forms the whole of the land comprised in the title."

21. (1919) Cmd. 424.

22. p. 18.

20. The general boundaries principles is now contained in rule 278 of the 1925 Rules. It is identical with the corresponding provision in the 1903 Rules except that it is divided into four numbered paragraphs.

21. It was said by the Royal Commission of 1870, and has been repeated subsequently, that people in this country are quite content to let questions of boundary lie dormant. With rising land values and the need to make the most efficient use of land, we doubt whether that statement would necessarily be accepted today. Indeed we question whether it was ever wholly true. What we think is true is that at the time of a purchase, the average purchaser is more concerned with the many other matters involved, and if it is pointed out to him that the deeds do not precisely define each boundary he will probably feel that he is willing to accept the position. Moreover there is often no real problem because there are physical features on the ground clearly indicating the extent of the particular property. In relation to those boundaries where difficulty might arise we think he is very unlikely to want to delay his purchase and incur the expense (and the possibility of acrimony with his future neighbours) of getting those boundaries fixed. The last thing, too, that his vendor would wish to happen is that the possible "hornets' nest" involved in fixing boundaries should be stirred up at a time when he wants to dispose of his property, and get has money, quickly. Different considerations apply where it is known that the land is to be developed up to or near the boundary, but in the vast majority of cases we believe that no actual difficulty arises from undefined boundaries unless there is a difference of opinion as to the maintenance of a boundary feature or the owner on one side wants to carry out some work on or near a boundary. He may, for example, wish to replace a hedge by a wall or a fence, or to fell a tree; or he may wish to erect a garage or a garden shed. But if neither of the adjoining owners wishes to carry out such works it is unlikely that practical inconvenience will be caused by any lack of precise definition of the boundaries.

22. In putting forward the view that we do not think that registration with general boundaries causes any real difficulty in the vast majority of cases, we are only too aware that a landowner who needs to know exactly where an undefined boundary runs may well think that he has been let down by the system, if neither he nor his solicitor can obtain that information from what is shown in his Land Certificate. Whilst we have great sympathy with a person who finds himself in that position, we do not think that there is any practicable way of avoiding it. Except that land is in greater demand, we can see nothing that has substantially changed in this context since the Royal Commission reported in 1870 or the Scott Committee in 1919. We think that the many difficulties in providing for a fixing of all boundaries remain and our provisional view is that registration with general boundaries is the only practicable alternative. We feel, however, that a sense of disappointment on the part of a landowner might be obviated if it were made clear to him before his acquisition that the boundaries of his land would only be defined generally in the Land Register and in his Land Certificate. If he then wishes to have his boundaries fixed, it is open to him to make use of the procedure laid down in the rules[23] and which we discuss in paragraphs 30 to 36 below.

Other Jurisdictions

23. Before leaving the general boundaries rule, we must point out that the reasoning behind it seems not to be unappreciated in other jurisdictions.

Scotland

24. The general boundaries rule has recently been considered by two departmental committees set up to consider the introduction of registration of title into Scotland. A committee under the chairmanship of Lord Reid, which reported in 1963,[24]

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23. rr. 276 and 277.
24. (1963) Cmnd. 2032.

recommended that the English general boundaries rule should not be applied to the proposed Scottish system. Their reasoning for so recommending was based on the fact that although general boundaries were readily accepted in unregistered conveyancing in England, the position in Scotland was otherwise. The purchaser in Scotland generally expects to be given a fixed boundary which can be plotted on the ground and which is guaranteed by the seller's warrandice. They therefore concluded that the introduction of the general boundaries rule in a system of registration of title in Scotland would be a retrograde step.[25] Six years later, however, a committee under the chairmanship of Professor G. L. F. Henry took rather a different view:-[26]

> "The Reid Committee Report, paragraph 103, recommends that the English General Boundaries Rule (Rule 278 of the Land Registration Rules, 1925) should not be applied to the Scottish system. On the other hand views expressed to us by the English Registrar, by the Irish Registrar, by Officers of Ordnance Survey, and from other sources, caution against the difficulties which may arise from a requirement placed on the Keeper to give an absolute guarantee of fixed boundaries. In particular there was cited the experience in England before adoption of the General Boundaries Rule in 1897 (see Registered Conveyancing (2nd Edition) by Curtis & Ruoff, pages 62-64). Although the English Rule is framed in wide terms which may lead to a misconception of its true purpose its application in practice is, generally speaking, to identify the boundaries but not the exact line thereof, a position in part imposed by such factors as limitations in scaling a map and small errors of representation in the map itself. Scots conveyancers are already accustomed to stated measurements in a boundary description being subject to the qualification 'or thereby'. Consequently we consider that it is justifiable to make the guarantee subject to this well known qualification of 'or thereby' in relation to the area of lands and the position and length of the boundaries, even although the result may appear to approximate to the English General Boundaries Rule. Beyond this, however, a majority of us feel that, in the light of the experience of others, it is appropriate to incorporate a provision that when a physical

25. See ibid. paras. 103 and 104.

26. See (1969) Cmnd. 4137 p.40.

object forms a boundary the exact boundary line along that object will not be guaranteed unless it is specifically stated in the Title Sheet. We have coupled this with a further provision that the Title Sheet will expressly disclose what a title declares to be the exact boundary line in relation to the physical object.[27] It will always be open to parties in a dispute to found on their titles to establish what they consider to be the true boundary line and any divergence established from what is given in the Title Sheet may lead to a question of rectification or non rectification of the Register with consequent indemnity claims."

In short, the Henry Committee came to the conclusion that something approximating to the General Boundaries Rule should be a feature of the system to be adopted in Scotland.

Northern Ireland

25. Registration of title to land in Northern Ireland has also been the subject of a recent enquiry by a departmental committee, under the chairmanship of Mr Justice Lowry.[28] In that part of their report[29] which discussed the existing system of registration of title in Northern Ireland under the Local Registration of Title (Ireland) Act 1891, they said:-

"58. Boundaries appearing on Land Registry maps are not normally conclusive ..... but they may be made conclusive in certain cases..... Boundaries may also be made conclusive by agreement..... When boundaries are conclusive it is the practice to enter a note to that effect in the folio; but it is rare to find cases in which boundaries are conclusive or have been made conclusive by agreement. The reason is that boundaries involve third party interests and, unless there is a boundary dispute as regards a particular plot of ground, the registered owner does not wish - and indeed does not need - to bring in third parties to have the boundaries specifically defined."

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27. See paras. 43 and 44 below where the application of a similar provision in England and Wales is discussed.

28. Now Lord Chief Justice of Northern Ireland.

29. (1967) Cmd. 512.

The committee made no specific recommendation as to boundaries but it is clear from what is said in the passage from their report which we have quoted that they accepted the principle of general boundaries for registered land.

Commonwealth

26. In the Commonwealth there are two main systems of registration of title. One is based on the system that we have here. The other is derived from the system introduced into South Australia by Sir Robert Torrens in 1858, and commonly named after him. The Torrens system is also found in some of the states of the United States of America. In those parts of the Commonwealth that have followed us, the general boundaries rule has been almost invariably adopted.[30] Torrens himself regarded guaranteed fixed boundaries as an essential feature of registration of title and in thosecountries where title registration is based on his system fixed boundaries, are we understand, the rule (at least in theory).

27. Nevertheless, even in those jurisdictions where registration of title appears to guarantee title to boundaries, it seems that, in practice, this is not always the case. In New Zealand, for example, where a Torrens system operates, an applicant for registration under the Land Transfer Act 1952 has to supply a plan of the land showing the boundaries and their relative position,[31] prepared in accordance with certain specified requirements and verified by a registered surveyor. When the applicant becomes the registered proprietor, he becomes the absolute owner of the land subject only to the matters

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30. e.g. Kenya, Malawi.

31. Land Transfer Act 1952 (N.Z.), s.167.

entered on the register.[32] There are, however, some exceptions to the indefeasibility of title which is conferred by registration. The exception that is relevant here is that which relates to:-

> "any portion of land that may have been erroneously included in the grant, certificate of title, lease, or other instrument evidencing the title of the registered proprietor by wrong description of parcels or of boundaries."

Furthermore, where any building encroaches on any adjoining land, the court may on the application of either party make various orders including one vesting in the encroaching owner the piece of land encroached upon, subject to such terms and conditions as the court thinks fit including the payment of money.[33] Again, provision is made in New Zealand for titles "limited as to parcels." Such titles do not guarantee the position, area or boundaries of the land in question and the immediate necessity for a survey is thus avoided. A former Registrar-General of land in New Zealand, writing in reference to titles limited as to parcels, comments that "curiously enough this species of uncertainty does not cause much concern to landowners, especially where the value of the land is not great. This is shown by the readiness of most proprietors to accept titles limited as to parcels...".[34]

28. The question of fixed or general boundaries is, we suspect, one of those matters on which controversy will never wholly be stilled; and each will continue to have its supporters. At a recent discussion on the role of survey in land registration organised by the Royal Institution of Chartered Surveyors on 15 April 1971, a surveyor from Australia is quoted as saying:-[35]

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32. ibid. s.62.
33. Property Law Amendment Act 1957 (N.Z.), s. 5.
34. E.C. Adams, The Land Transfer Act 1952. para. 465.
35. Chartered Surveyor July 1971. p. 14.

> "We find that the Torrens system, in use in Australia, works reasonably well but it has certain drawbacks. The actual cost [of survey] to the buyer could be rather high but compared with the cost of the transaction it plays a pretty insignificant part. We find, of course, that the proportion of survey costs climb as the value of the land decreases. Time is another adverse factor. It can take up to two and a half years to bring land under the Torrens system. Nevertheless I feel that the system in Australia is virtually necessary in regard to land survey in the outer areas. It is not easy to identify terrain on air photographs and I doubt if fences[36] often consisting of odd posts, could be picked out."

He concluded by saying:-

> "In Australia a great deal of time is taken up comparing boundaries. This results from improvements in accuracy of the survey and is causing problems. It takes time and causes expense with regard to the registration. I think that a combination of both systems might be satisfactory."

By way of comment on the suggestion that a combination of both systems might be satisfactory, we think that the English system, in that it makes provision for the fixing of boundaries where required might be said to provide such a combination.

France

29. While the Ordnance Survey Department in England and Wales has produced a purely topographical map, the surveys in France (beginning with that started at Napoleon's instigation in 1807) have been directed to indicating also the parcels in

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36. In England there is no general obligation to fence. In parts of the Commonwealth there is a statutory liability on occupiers of adjoining lands to construct a dividing fence sufficient for the purpose of both occupiers (See e.g. Fences Act 1968 (Victoria)). In other parts a proprietor of registered land is bound to maintain in good order the fences, hedges, stones, pillars, walls and other features which demarcate his boundaries. (See e.g. Registered Land Act, cap. 300 (Kenya)).

separate ownership. This has sometimes been called the cadastral system. There have been several not wholly successful attempts at producing a nation-wide series of accurate maps. A procedure exists by which neighbouring owners can attend the inspection of the ground carried out by the official surveyor, and if they agree the position of any landmarks indicating the boundaries, these are shown as such on the resulting map. Similarly, if the ownership of boundary features is agreed by the interested parties, this too is indicated on the map by way of conventional signs placed against the features. We understand, however, that any such indications on the map give rise to presumptions only, and do not constitute a formal fixing of boundaries, since the whole procedure is administrative and not judicial. If the interested parties do not attend the surveyor's inspection of the ground, the boundary features will appear on the map without any indications of ownership; in other words, the map will show general boundaries only.

The "fixing" of boundaries

30. The provisions as to fixing boundaries of registered land are contained in rules 276 and 277 which are as follows:[37]

> "276. If it is desired to indicate on the filed plan or General Map, or otherwise to define in the register, the precise position of the boundaries of the land or any parts thereof, notice shall be given to the owners and occupiers of the adjoining lands, in each instance, of the intention to ascertain and fix the boundary, with such plan, or tracing, or extract from the proposed verbal description of the land as may be necessary, to show clearly the fixed boundary proposed to be registered; and any question of doubt or dispute arising therefrom shall be dealt with as provided by these rules.
>
> 277. When the position and description of the boundaries of the land have been thus ascertained and determined, the necessary particulars shall be added to the filed plan or General Map, and a note shall be made in the

37. These rules are virtually the same as those (211 and 212) contained in the 1898 Rules.

Property Register to the effect that the boundaries have been fixed. The plan or General Map shall then be deemed to define accurately the fixed boundaries.

What is meant by "fixing" a boundary

31. It will be seen that the "fixing" of a boundary under these provisions involves two distinct processes. The first is the ascertainment of the position of the boundary. It is only when that has been done that the second step can be taken, namely the fixing of the boundary so ascertained as a matter of record. But fixing in this context means more than just recording the position of a boundary by reference to physical features in the vicinity of the land in question. If the operation is to have any real virtue, it is necessary for the position of the boundary to be recorded in such a way that it can always be reconstructed even if the whole surrounding terrain changes as the result, for example, of enemy action or flooding. This, in practice, is done by fixing the boundary by reference to National Grid co-ordinates supplied to the Registry by the Ordnance Survey Department. From these co-ordinates the position of a boundary could always be reconstructed.[38]

32. The Land Registry's role in the fixing of boundaries is primarily an administrative one, and is largely confined to carrying out the second step in the procedure. If the first step in the procedure, the ascertainment of the position of the boundary, requires a judicial determination, the Chief Land Registrar may refer that matter elsewhere. At present,

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38. The cost of providing the relevant National Grid co-ordinates would be high if the boundary to be "fixed" lies in an area which has not been resurveyed by the Ordnance Survey Department on the 1/1250 scale.

that reference must be to the High Court, but we would put forward for consideration the suggestion that the Chief Land Registrar should be empowered to refer suitable cases to the Lands Tribunal instead.

A fixed boundary is not fixed for ever

33. "Fixing" a boundary only fixes the position of the legal boundary as it exists at a particular point in time; but it will not necessarily remain in that position for all time. For example, features marking a boundary, such as fences or hedges, may be moved or may be replaced by other structures which are not placed on exactly the same line. That, by itself, would have no effect on the position of the legal boundary; but in due course of time the landowner favoured by the movement of the physical features may obtain a title by adverse possession[39] to the land between them and that legal boundary, and thus the new line may come to constitute the legal boundary between the adjacent landowners. Any shifting of legal boundaries in this way will supplant any previous fixing of the boundaries under the provisions of the Act. In some of the countries in which the Torrens system operates, it is not normally possible to acquire by adverse possession rights in respect of land with registered title. The reason for this is that in those countries a registered title is generally "indefeasible" and it is inconsistent with the concept of indefeasibility of title that rights not recorded on the register can prevail against it. As we pointed out in our Second Working Paper[40] we are

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39. Actions for the recovery of land are, under the Limitation Act 1939, barred, usually after 12 years undisturbed possession. That Act applies to both registered and unregistered land. In the case of registered land, however the estate of the proprietor is not automatically extinguished at the end of the limitation period, but is held on trust for the adverse possessor until the latter perfects his title by a change in the proprietorship register (Land Registration Act, s.75).

40. In para. 55.

not, in our present study, concerned with the merits or demerits of the acquisition of rights in land by adverse possession. Nevertheless, we think that in relation to boundaries the operation of the Limitation Act, in giving legal effect to situations of long standing to which no objection has been made, is probably an important factor in avoiding, or settling, possible disputes. The operation of the Limitation Act does, however, mean that even a fixed boundary cannot be said to carry a State "guarantee" if the registered proprietor fails to retain possession of his land. Rights acquired or in the course of acquisition under the Limitation Acts are overriding interests,[41] and that has two consequences in this context. First, where there has been an encroachment on land comprised in a registered title, the register may be rectified to take the relevant piece of land out of the title once the rights of the registered proprietor have been barred.[42] Secondly, where that has happened, the registered proprietor will have no claim for indemnity in respect of the land which he has lost.[43]

The practice and cost of fixing boundaries

34. The rules do not specify in any detail the procedure to be followed on an application to fix boundaries.[44] The cost of the application will fall on the applicant and these can, even in a relatively simple case, be considerable. To fix a boundary involves, in addition to serving notices on third parties, examining their titles, carrying out an

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41. s. 70(1) (f).

42. s. 75. See also s.82(3).

43. Re Chowood's Registered Land [1933] Ch. 574

44. The procedure is described in Curtis & Ruoff, Registered Conveyancing 2nd. ed, pp. 68, 69.

exhaustive survey and settling the line of the boundary with all interested parties. There may too be questions of doubt or dispute which need to be determined judicially. All this takes time and the Chief Land Registrar informs us that in the cases which have occurred and of which there is a record, the shortest time taken was three months and the longest twenty-one months. In fact, however, there have only been nine cases where boundaries have been fixed since complete records were first kept in 1937.[45] Experience of such applications is therefore very limited.

Provisional conclusion as to fixed boundaries

35. Although the procedure for fixing boundaries may seem to be over-elaborate and expensive, we cannot see how it could, in practice, be simplified without putting the rights of third parties in jeopardy. It seems to us essential that adjoining owners and occupiers should be notified. Tracing them and trying to obtain their agreement are likely to be time-consuming and troublesome factors - all the more so if, as is possible, they do not wish to co-operate. The great benefit of registration with general boundaries is that it avoids possible disputes between neighbours by "letting sleeping dogs lie". Any procedure for fixing boundaries must inevitably have the opposite effect. That the existing procedure for fixing boundaries has been so little used does not prove conclusively that registration with general boundaries is satisfactory. Potential applicants for fixing boundaries may have been deterred by the inevitable substantial cost and time necessarily involved in determining such an application. Nevertheless, the

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45. These records do not show the number of applications to fix a boundary where fixing did not actually take place. Since 1960, however, there have been six applications which did not proceed for various reasons. (e.g. in one case the applicant stated that he was unable to obtain an abstract of title to the adjoining owner's land).

facts are that over a period when there were over three and a quarter million relevant applications for title registration,[46] there were only nine cases of boundaries having been fixed.

36. Our provisional conclusion is that the existing procedure for fixing boundaries to be employed at the request and expense of an applicant should be retained. It is the same conclusion as that reached by the Scott Committee who stated that they thought the procedure (embodied in a set of rules almost identical to those now in force) was "convenient and sufficient, and should be retained".[47]

Criticisms of Registry plans

37. Criticisms are sometimes made that the Registry plans are, in some cases, not so informative as the best plans used in unregistered conveyancing and that on registration of a title, information contained in the deeds is not reproduced on the register or the filed plan. In relation to these criticis we think that there are two general points which should be made. First, having regard to the liability to pay indemnity in respect of mistakes in the register, the Registry is bound to exercise caution in entering on the register or on the filed plan matter the accuracy of which it has not been able to verify (e.g. an entry as to the ownership of a boundary which has not been agreed with the owners on either side and at each end of the boundary). Secondly, whatever may have been said to the contrary, we think that the pre-registration deeds ought to be retained. It may be that in the vast majori of cases they will never again have to be referred to. There may, however, be cases where the ownership of a boundary of a property registered with general boundaries is in dispute, and the manner in which the property has devolved in the past may be relevant.

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46. i.e. Applications for first registration and transfers of part.

47. (1919) Cmd. 424 p.18

38. Specific criticisms which are often made in relation to the identification of registered land and in particular as to filed plans are discussed below. They are as follows:-

(i) "T" marks are not invariably shown on filed plans.

(ii) The state of cultivation is not shown.

(iii) Ordnance Survey numbers and acreages are not shown.

(iv) Plans are on too small a scale.

(v) Evidence as to boundary features and their ownership is lost on first registration.

"T" Marks

39. The Registry, will in fact, often show "T"marks on a filed plan and its practice, in this respect, is set out in Practice Note No.34 which is reproduced in Appendix C. No further comment as to this seems necessary.

State of Cultivation

40. This is not shown on file plans or in the Register, presumably, because it can change from time to time and unless the Register is correspondingly amended, the entry could be misleading. An entry that a particular field is "arable" at the time of first registration may well have little significance in, say, ten years time when the field may, perhaps, have been laid down to permanent pasture.

Ordnance Survey numbers and acreages

41. These are further matters in relation to which the Registry practice is explained in a Practice Note. This is No. 12 and it is reproduced in Appendix C. In addition to the reasons there set out, it seems to us that having regard to the general boundaries rule, it could be misleading if the acreages in the Ordnance Survey Maps were to be reproduced on the filed plan,[48] since it would then appear that they were "guaranteed".

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48. See para. 12 above.

Scale of plans

42. The scale of the plans used by the Registry is a matter which we regard as primarily one of administration and, as we have already indicated, outside the ambit of our present study. Nevertheless, we should mention that a number of our correspondents thought that the scales used for filed plans were often too small for their requirements. The Registry are, however, prepared in certain circumstances[49] to use detailed plans or architectural drawings either as an adjunct to, or in substitution for the filed plan.[50]

Evidence lost on first registration

43. Unless a boundary has been fixed, the Registry cannot, having regard to the general boundaries rule, guarantee the position of a boundary or the ownership of a boundary feature. Where, however, a conveyance or transfer contains a declaratio as to the ownership of fences or other boundary structures it is the practice of the Registry to make an entry in the Regist in respect of the declaration.[51]

44. In view of this practice it largely lies in the hands of the parties to ensure that the available evidence as to the ownership of boundary features is crystalized in a declaration in the conveyance or transfer which can be recorde on the register. If the making of such declarations were to become common form we think that there would be less force in the criticism that valuable evidence as to boundary features and their ownership is lost on first registration.

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49. We understand that whatever scale of map is used for title plans, the Registry will, in many cases, prepare an enlargement of any particular feature where it could not be otherwise described adequately.

50. See Ruoff, Concise Land Registration Practice, 2nd. ed p.23.

51. See Practice Note No. 34 (Reproduced in Appendix C).

The accuracy of plans

45. A cause of difficulty in relation to first registrations and transfers of part is that the Registry are sometimes unable to reconcile the property as shown in the plan lodged by the applicant with what appears in the Ordnance Survey Maps or on the actual site.[52] Before a filed plan can be prepared it may be necessary to refer the matter back to the applicant for clarification. The practice of the Registry in such cases is stated to be as follows:- [53]

> "When boundaries on the ground are defined by physical features but the conveyance or transfer plan does not conform with those features, either the plan or the boundaries must be altered so that the two correspond .....When the deed or transfer plan on which the registration is based is so badly drawn or so ambiguous that it is not possible to decide whether or not it represents the fenced boundaries, either the application will be cancelled by the registry or the filed plan must be approved by all interested parties before the registration is completed. When there are no physical features on the ground defining the boundaries of the land, the governing factor will always be the deed plan. The existence of survey pegs which do not agree with the boundaries shown on a plan will be ignored by the registry".

46. There are some cases in which defects in the applicant's plan only come to light after the applicant, if he is a purchaser, has completed his purchase and paid over the purchase money. The defects in such cases are discovered when the Registry comes to prepare the title plan.

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52. On an application for first registration, the applicant must supply sufficient particulars, by plan or otherwise, to enable the land to be fully identified on the Ordnance Map or Land Registry General Map. (r.20 (iii)).

53. Ruoff, Concise Land Registration Practice, 2nd.ed. p.29

47. In those jurisdictions where the Torrens System operates we understand that it is, in fact, the practice to require plans lodged at the Registry to be certified by a surveyor licensed for the purpose, in order to ensure their accuracy; and it has been suggested that a similar practice should be adopted here. Although this practice must, we imagine, virtually eliminate the chances of the purchaser finding that his plan is unacceptable to the Registry, we think there would be objection here to increasing the cost of every relevant[54] transaction by the fees of a licensed surveyor.[55] Such fees would be likely to be substantial. Similar objections, on the grounds of expense, also apply to another suggestion that has been made to us, that all plans on conveyances leading to a first registration should, by statute, be based on the Ordnance Survey Map. In some cases only a suitably qualified architect or surveyor could be relied upon to prepare such a plan satisfactorily.

48. On the assumption that it would not be acceptable to require all plans lodged at the Registry to be certified or prepared by an approved surveyor or to be based on the Ordnance Survey Map, we have considered what other steps could be taken to minimise the risk of error and, in particular, to ensure that difficulties in relation to plans are, so far as is possible, brought to light at an early stage in the proceedings. First and foremost, the importance of checking the plan or description in the draft contract or lease with the situation on the ground can hardly be too strongly urged. Secondly, all plans used in connection with applications to the Registry should be as accurate as possible and be adequate to identify the land on the Ordnance Map, or, in the case of a transfer

54. i.e. a first registration of a freehold or leasehold title, or any disposition of a registered title where the land is subdivided.

55. It is appreciated that in many cases a surveyor will be employed by a purchaser to carry out a structural survey.

or lease of part of the land in a title, with the filed plan of that title. Thirdly, the proper use of facilities for searching the Index map and parcels index may be of some assistance in this respect in relation to purchases of unregistered land.

49. Although the register of an individual title is not generally open to inspection without the consent of the proprietor of the land or any charge on it,[56] the Index map and parcels index may be inspected by anybody.[57] It is possible to make a personal search of the Index map and parcels index but the more usual procedure is to apply for an official search. This can at present be done without charge, and it has an advantage over a personal search in that the result will be intimated in the form of a certificate which will show whether the freehold interest in the land searched is registered or not, whether it is subject to any registered leases or rentcharges,[58] whether the land is affected by any registered caution against first registration or priority notice, and whether or not it is (or will on a known date be) in a compulsory registration area.

50. The form of search described in the previous paragraph may be helpful to a purchaser[59] in avoiding some of the difficulties that may arise when, after completion, he applies for his name to be put on the register. This is because it will tend to expose two species of defect to which a plan attached to the draft contract[60] (that is to say, a plan which

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56. The inspection of the register is discussed in Part D of our first Working Paper on Land Registration (No.32).

57. r. 12.

58. If so, certain particulars are disclosed.

59. Or a person taking a lease of unregistered land which will require, on completion, to be registered.

60. Or a plan attached to a draft lease.

is likely to be used as the basis for that on the conveyance or lease which will be submitted in due course with the application for registration) may be subject.

51. First, although the plan may be perfectly satisfactory in the sense that it enables the land to be readily identified on the map in the Registry, it may be defective in that it portrays more land than the vendor has to sell. The plan may have been copied exactly from some earlier deed and may fail to reflect the fact that part of the land has been sold off in the meantime, or that a neighbour has obtained title by adverse possession to a portion of it. If an intending purchaser thinks he is buying unregistered land, but a search of the Index map reveals that part of the land has been registered, he will know at once that something is wrong.

52. Secondly, the draft contract plan may not enable the Registry to reconcile with the Ordnance Map the unregistered land portrayed.[61] An intending purchaser attempting to obtain a search with the aid of such a plan will be told by the Registry that it cannot be done; and the purchaser can then take the matter up with his vendor.

53. If, in addition to checking the plan on the site, the appropriate search were always made before contract, we feel sure that some of the difficulties which now arise over identity would be obviated and expense saved.

54. Before leaving the topic of official searches of the Index map and parcels index there is one further point which we think is worth mentioning. It is whether or not it is necessary, or desirable, for the applicant for such a search to furnish a plan with his application. A note on the officia form states:-

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61. Under r.20, an application for registration must be accompanied by sufficient particulars by plan or otherwise to enable the land to be fully identified on the Ordnance Map or Land Registry General Map.

"The plan accompanying this application must contain sufficient details of the surrounding roads and other features to enable the land to be identified satisfactorily on the Ordnance map."

In practice, however, the Chief Land Registrar is prepared to dispense with a plan altogether where the land lies in a compulsory area and can be identified by a street number. The Registrar will, on request in such cases, issue a plan with the result of the search for a small fee (50p).[62] Whenever possible, however, we think it desirable that an applicant should submit a plan with his application for search because it clearly helps to ensure that he and the Registry are at one.

55. In addition to the searches of the Index map and parcels index, special procedures have been evolved to assist intending purchasers of plots on building estates where the title has already been registered, and which are in the process of being developed.[63] If the Registry has approved a detailed lay-out plan lodged by the vendor, or intending purchaser may (with the vendor's consent) apply for an official inspection of the vendor's filed plan by reference either to the plot number or to a plan of the plot. The resulting certificate will certify (if such be the case) that the plot is comprised in the vendor's registered title and will also state whether the plot is affected by any markings on the vendor's filed plan to which entries in the register refer.[64] If the title to any of the land comprised

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62. Where such a plan has been issued, it merely shows the area in respect of which an official search has been made. It does not necessarily represent the land comprised in the title deeds. (See Practice Note No. 60).

63. See H.M. Land Registry, Practice Note for Solicitors No. 7.

64. The Land Registration (Official Searches) Rules 1969 (S.I. 1969 No. 1179) r. 12.

in the plot has been registered in the name of another, the intending purchaser will be told [65] that this is not in the vendor's title.

Rural areas

56. Some of our correspondents who practice in rural areas which are not yet subject to compulsory registration have fears that the system is not well suited to the particular requirements of their clients. In that connection, it is perhaps relevant to draw attention to the Report[66] on the advisability of extending Compulsory Registration of Title on Sale to the County of Surrey. The final paragraph said:-

> "20. With regard to Surrey in particular I have given full consideration to the fact that a large proportion of the county is, and is likely to remain, rural in character. But although the advantages of registration are greatest in relation to land which has been, or is about to be, developed they extend also to rural land and I therefore regard the extension of compulsory registration on sale to this county as desirable in spite of its predominantly rural character."

The County of Surrey, in fact, became a compulsory area in March 1952.[67]

Conclusion

57. We are conscious that we have not put forward any suggestions for any substantial reform of the law relating to identity and boundaries, but our preliminary view is that in the context of this Paper no such reforms are needed. Nevertheless we think that some of the difficulties which are now

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65. When he makes his pre-completion search.

66. The Report is that of Mr. J. Neville Gray, K.C. and is dated 24 October 1951. Mr Gray was appointed pursuant to s. 122 of the Act to hold and conduct a public enqui into the desirability of extending registration of titl on sale to the county of Surrey (other than Croydon to which it had already been extended). It was following the enquiry and as the result of a proposal made at it that the Joint Advisory Committee of The Law Society and H.M. Land Registry was set up.

67. Pursuant to the Registration of Title (Surrey) Order 1952. S.I. 1952 No. 395.

encountered on an application for first registration of a title, or on the registration of a disposition from a registered title, might be avoided if more use were made of the procedures for obtaining official searches which we have mentioned above; and, also, if applicants were perhaps more conscious of the necessity of submitting to the Registry - whether on applying for registration or on earlier searches - plans which are as accurate as possible.

PART C. RECTIFICATION OF THE REGISTER AND INDEMNITY

I History and General Principles

58. The matters discussed in this part of this Paper raise a question of fundamental importance in relation to our system of registration, namely, what is the nature of a registered title?[68] How far can it, for example, be described as indefeasible in the sense that it is good against all the world?

59. The Land Registration Act 1925 declares that the effect of registration with an absolute title to freehold land is to vest in the proprietor an estate in fee simple in the land subject, broadly speaking, only to matters mentioned on the register and to overriding interests.[69] Subject to those exceptions the proprietor takes free from any other estate or interest whatsoever, including those of the Crown.[70] The appearance of indefeasibility which is thus, at first sight, given to an absolute title is however somewhat misleading because the Act also provides for the amendment of the register not only in favour of the registered proprietor but also, in certain circumstances, against him. This is what is called, in the Act, rectification.[71] Rectification of the register as we now know it has not always been permitted and to consider the matter it is necessary, first, to trace its history.

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68. In this part of the Paper references to registered titles are to titles registered as absolute.

69. See ss.5, 20 and 69(1). A third exception, contained in s. 5(c), protects the interests of beneficiaries where a trustee registers. (In relation to leasehold titles, see ss. 9 and 23).

70. In this context see A.-G. v. Parsons [1956] A.C. 421, Morelle Ltd. v. Waterworth [1955] 1 Q.B. 1 and Morelle Ltd. v. Wakeling [1955] 2 Q.B. 379.

71. s. 82.

60. When registration of title was first introduced into England and Wales,[72] the aim was to establish a system which would greatly simplify conveyancing, in particular by eliminating the repeated investigation of title over a given number of years from a good root.[73] This was done by making the register of title, in effect, an immediately ascertainable and guaranteed root of title. At that time when a registered title was granted it immediately became indefeasible and accordingly the arbitrary or mistaken creation of a registered title could seriously have affected the rights of third parties. It was no doubt for that reason that the greatest possible care had to be taken to ensure that on first registration the title to be registered was impeccable under the ordinary law. This involved not only the most rigorous examination of the title over the preceding sixty years but also (as noted in Part B of this Paper) meticulous definition of the boundaries. The examination of the title by the Registry could not, however, guarantee the detection of fraud; and it was necessary to make provision for rendering void entries made as the result of fraud. The Land Registry Act 1862,[74] accordingly permitted rectification of the register on the ground, of certain entries arising from fraud, but on no other. On the footing that, in the absence of fraud, only titles which were perfect[75] could find their way on to the register, this was logical; and any wider scope for rectification of the register would have undermined the concept of indefeasibility given to a title by registration.

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72. Under the Land Registry Act 1862.

73. The long title of the 1862 Act was "An Act to facilitate the proof of title to, and the conveyance of, real estates."

74. s. 138.

75. i.e. as to identification as well as in all other respects.

61. The scheme introduced by the 1862 Act was a failure: it strived to attain too great a measure of perfection and so rigorous were the requirements for registration that hardly any titles were registered.[76] The system was overhauled by the Land Transfer Act 1875 and the conditions for registering titles were very considerably relaxed. The concept of "indefeasibility" of title given by registration was, however, retained. Although the Court was empowered[77] to order rectification of the register in certain circumstances unconnected with fraud, it was still not permitted to order rectification so as to affect rights acquired by registration.[78] Indefeasibility of title was further ensured by a provision that a title could not be acquired under the Limitation Acts by possession adverse to the title of a registered proprietor.[79]

62. The relaxation in the standards required on first registration of a title permitted by the 1875 Act introduced a greater risk of error. To offset that risk, the Land Transfer Act 1897 provided that if anyone suffered loss in consequence of an erroneous registration which could not be rectified, he should be indemnified, unless the loss were wholly or substantially attributable to his own act, neglect or default.[80] If that provision had stood alone, it would have made no breach in the principle that a registered title was indefeasible. It appears to have been appreciated, however, that money is not always an adequate recompense for the loss of an interest in land and the 1897 Act accordingly provided[81] that in certain circumstances the person prejudiced

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76. Registration under the 1862 Act was voluntary.
77. By ss. 95 and 96.
78. Land Transfer Act 1875, s. 95.
79. ibid. s. 21.
80 ibid. s. 7(1) and (3).
81. s. 7(2).

by the erroneous registration could obtain rectification of the register instead of indemnity, and, if that happened, it was the registered proprietor who might be indemnified. The 1897 Act also gave, for the first time, a limited power, in certain circumstances, for the Court to order rectification of the register in favour of a person who would, if the land had not been registered, have acquired a title to the land by adverse possession.[82]

63. With these provisions of the 1897 Act the principle of indefeasibility of registered titles in England and Wales was abandoned. When the system was next reviewed as part of the sweeping reforms in the law of property culminating in the legislation of 1925, the door to rectification was opened still further. This was the effect of section 82 of the Land Registration Act of that year which we consider in detail below. Although there was a widening of the grounds on which rectification of the register could be ordered, this was not normally to be permitted so as to affect the title of a proprietor who was in possession.[83]

64. The 1897 Act represented a landmark in another important respect. It introduced the principle of indemnity not only as an alternative but as a complement to rectification. If the case for rectification were sound, the person seeking it would, unless he were at fault, succeed to that end or obtain indemnity if he failed; if he succeeded the proprietor was indemnified. In 1925, when further grounds were added, the categories of fault, disentitling an applicant to indemnity, were reduced from "act, neglect or default" to fraud only. We think that this

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82. s.12. Rectification could only be ordered "Subject to any estates or rights acquired by registration for valuable consideration".

83. But see paras. 78 and 79 below in which we discuss how the Court's construction of this provision has, in many cases, rendered it nugatory for a first registered proprietor.

was deliberate.[84] It seems that Parliament recognised that the principle of indefeasibility on which registration of title had been grounded had been irretrievably lost. It therefore, replaced it by the concept of insurance. On that basis a proprietor with an absolute title would either keep his title intact or (unless he were guilty of fraud) be able to obtain monetary compensation if his title were to be adversely affected by rectification. The State, as the insurer, would be entitled to recover any compensation it had paid from any person who had caused the loss by his fraud,[85] and to enforce any covenant or other remedy which the insured person (the registered proprietor) would have been entitled to enforce against any third party.[86]

65. The Land Registration Act 1966[87] made a short-lived inroad into the insurance concept by adding to the class of person barred from obtaining compensation a person who had himself caused or contributed to the loss by "any act, neglect or default". It was later accepted that in this respect the 1966 Act had gone too far[88] and in the Land Registration and Land Charges Act 1971[89] the expression "lack of proper care" has been substituted for the words "act, neglect or default" inserted by the 1966 Act. This has gone some, but not all of the way towards restoring the degree of insurance provided by the 1925 Act.

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84. For a contrary view, see (1966) Hansard (H.L.) Vol. 274 Col. 1298.

85. s. 83(9).

86. s. 83(10).

87. s. 1(4).

88. For a criticism of this provision of the 1966 Act see (1968) 84 L.Q.R. 528 (Cretney and Dworkin).

89. s. 3.

II Rectification of the Register

Grounds upon which the register may be rectified

66. The circumstances in which the register may be rectified are set out in subsection (1) of section 82 of the Act.[90] In some cases only the Court may order rectification, in others either the Court or the Registrar[91] may do so. As will be seen,[92] the grounds upon which the register may be rectified are numerous. In particular, rectification may be ordered "where by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register".[93] The operation of the sub-section is, however, curtailed where the proprietor is in possession.[94]

The particular case of fraud

67. One of the grounds on which the register may be rectified is where the Court or the Registrar is satisfied that any entry in the register has been obtained by fraud.[95] Clearly, a case of forgery would come within this provision and so would a case where the Court is satisfied that the transfer to the registered proprietor was executed in such circumstances that the transferor can successfully plead that the deed was not truly his at all. Moreover, in Re Leighton's Conveyance[96] the Court held that the undue influence of the transferee in procuring the execution of the transfer was sufficient to enable the

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90. Powers to amend the register are conferred by the following other provisions:- s. 75 (Acquisition of title by possession), ss. 78 and 92 (Transitional provisions in relation to undivided shares and settled land) and r.131 (Power of disposition vested in a person other than the proprietor). The Registrar has power to correct errors under rr. 13 and 14. These rules are discussed in para. 68 below.

91. Subject to an appeal to the Court.

92. The text of s. 82 is set out in Appendix D.

93. s. 82(1) (h).

94. By subs. (3) which is discussed below.

95. Under para. (d) of s.82 (1).

96. [1936] 1 All E.R. 667.

Court to order rectification of the proprietorship register by striking out the name of the transferee and inserting as proprietor the name of the transferor. But, the Court further held on the facts of that case that the transferor's execution of the transfer had been careless and that there was accordingly no ground on which the charges register should be rectified against three people who had lent money to the transferee on the faith of the transfer and without knowledge of the transferee's fraud. The charges thus remained enforceable against the property.

Correction of Errors

68. In addition to the powers of the Court or the Registrar to rectify under section 82 of the Act, the Register has certain powers under the Rules to deal with errors. Under rule 13 he has power to correct clerical errors or errors of a like nature in the register or in any plan or document referred to in the register which can be corrected without detriment to any registered interest. In such a case the correction can be made after giving any notices or calling for any evidence or obtaining any assent the Registrar may deem proper. He also has power, under rule 14, to cancel (in whole or in part) a registration where land has been registered in error and the matter is too serious to be dealt with under rule 13. The power to cancel a registration under rule 14 can only be exercised with the consent of the proprietor and all other persons appearing to the Registrar to be interested in the land, or after notice to them and such enquiry as the Registrar may deem necessary. No limitation is placed on the power of the Registrar to "rectify" under these rules [97] and the relationship between them and the powers of the Registrar to rectify in similar circumstances under section 82 are not, perhaps, entirely clear.

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97. Chowood Ltd. v. Lyall (No.2) [1930] 1 Ch. 426 per Luxmoore J. at 439.

Are the existing powers to rectify the register satisfactory?

69. Provided there are adequate safeguards, we suggest that it is right that the grounds upon which the Court (or where appropriate the Registrar) has a discretion to order rectification of the register should be widely drawn so as to enable justice to be done. The provisions of section 82 (1) are, in fact, so drawn.

70. Whether the provisions of section 82(1) are wide enough to enable the Court to order rectification to give effect to any interest which, had the land been unregistered, would have been effective, is somewhat uncertain. The sort of interest (conveniently called "an estoppel interest") recognised by the Court in E.R. Ives (Investment) Ltd. v. High[98] may be a case in point. Such an interest may constitute "a right or interest in or to any registered land" within paragraph (a) of section 82(1), but it does not fall within any of the categories of overriding interest and such an interest is unlikely to be specifically protected by an entry on the register.[99] Having regard to the terms of sections 5 and 20,[100] it would seem to follow that if, after the interest has arisen, the burdened land becomes registered land or is the subject of a registered disposition for value, the proprietor (or new proprietor, as the case may be) would take free of the estoppel interest. From the moment of registration, it may not be possible to

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98. [1967]2 Q.B.379. The term "estoppel interest" is borrowed from an article on the case by Professor Crane in (1967) 31 Conv. (N.S.) 332.

99. Possibly by a caution. (see Elias v. Mitchell [1972] 2 W.L.R. 740 and the doubts expressed by Cross J. in Poster v. Slough Estates Ltd. [1968] 1 W.L.R. 1515 at 1521).

100. Under the sections the proprietor, in effect, obtains the registered estate subject to matters entered on the register and to overriding interests but free from all other estates and interests whatsoever.

rectify the register in favour of the person who had owned the benefit of the estoppel interest, because section 5 (or section 20) had effectively deprived him of any "right or interest in or to any registered land" on which to base his claim. This consequence of sections 5 and 20 may be productive of injustice and in our view the jurisdiction to rectify should be sufficiently wide to overcome it.[101]

71. In our Second Paper[102] on Land Registration we discussed in some detail, the decision of the Court of Appeal in Hodgson v. Marks and another.[103] In that Paper we said:-[104]

> "As a recent case demonstrates, a right to the fee simple in equity may be an overriding interest under paragraph (g), if coupled with occupation. In Hodgson v. Marks, the plaintiff (an elderly lady) had transferred the registered title to her house to her lodger, but she continued to live there as before. The lodger held the property as bare trustee for her but sold it to the defendant Marks, who became the registered proprietor. The Court of Appeal (overruling Ungoed-Thomas J.) held that Marks should have discovered the plaintiff's rights by enquiry, and ordered the rectification of the register in the plaintiff's favour. While we do not wish to suggest that that particular case was decided otherwise than in accordance with the merits, we think that it is unsatisfactory that the law should require cases of that sort, involving two innocent parties, to be decided on a basis which can only result in total failure for one side or the other.[105] Mrs. Hodgson had not taken any steps to protect her beneficial interest on the register and had she failed to establish that she was "in occupation" when Marks became the registered proprietor (as, indeed, she did at first instance) she would have lost her home: as it was, she was held to have had an overriding interest, so that the defendant Marks and his mortgagee were deprived of all rights in relation to the house. It will be borne in mind that rectification of the register to give effect to an overriding interest does not entitle the

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101. We would not favour making estoppel interests overriding interests.

102. See paras. 56-77.

103. [1971] Ch. 892.

104. Para. 69.

105. Subject to any remedy that either may have against the third party.

proprietor against whom it is made to compensation under section 83.[106] It seems to us that cases of this class could be more satisfactorily dealt with if the Court had wider powers in the field of rectification and indemnity, and we propose to consider that part of the Land Registration law in a later Working Paper."

72. As the law now stands, it seems that in that case the plaintiff was obliged to base her claim on the argument that her right to the house constituted an "overriding interest", because her right had not been specifically protected by an entry on the Register[107] and the first defendant, upon becoming the registered proprietor, took free of the plaintiff's right unless it were an overriding interest.[108]

73. As we have pointed out in our earlier Working Papers,[109] one of the primary objects of the land registration system was to simplify conveyancing, and its introduction was not intended to have the effect of altering the substantive law, save to the extent that certain estates and interests in registered land were positively required to be registered in order to ensure that the system worked. To be consistent with that principle, the scope of the jurisdiction to rectify the register should not, we think, be restricted by considerations peculiar to the system itself, but should be wide enough to allow any person who would have had an estate, right or interest in the land had the land not been registered, to apply for rectification (or indemnity). That must, we agree, be subject to the provisions in the Act positively requiring certain estates and interests to be registered, and a failure to comply

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106. Re Chowood's Registered Land [1933] Ch. 574; Re Boyle's Claim [1961] 1 W.L.R. 339.

107. By, e.g., a caution: see Elias v. Mitchell [1972] 2 W.L.R. 740.

108. s. 20 of the Act.

109. e.g. in Working Paper No. 32 para. 6.

with those provisions should not be capable of being made good by rectification. Nor should it be possible by rectification to give effect to an interest which, had the land been unregistered, would have been ineffective against a purchaser for lack of registration as a land charge under the Land Charges Act.[110] On the other hand, a failure to protect (by entry on the register) some interest which would not have been registrable under the Land Charges Act in the case of unregistered land should not be regarded as an absolute bar to rectification (or indemnity).

74. If the principles discussed in the preceding paragraph were to be carried into effect a case such as Hodgson v. Marks[111] might be approached in a new light. The plaintiff would put forward her claim to rectification of the register on the basis of the equitable right to the house which she would have had if the title had not been registered: a right which the Act did not require to be substantively registered (indeed, it would not have been capable of being so registered) and which was not in the nature of a land charge which ought to have been protected by entry of a notice. Whether the plaintiff's application would succeed or not would depend on the merits of the case, but in any event the losing party would prima facie be entitled to indemnity.

75. Although the jurisdiction to rectify might be clarified in the manner outlined above, we suggest that it should not be too readily exercised. As we have shown earlier in this part of this Paper, the sanctity of the register is not, and had not been for many years, a cardinal point of principle; nevertheless, the reliability of registered titles is clearly one of the virtues of the system.

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110. "Land charge" in this context includes any matter registrable under the Land Charges Act 1925 other than a local land charge. Rights under local land charges are overriding interests. (s. 70 (1)(i)).

111. [1971] Ch. 892.

Restrictions on rectification

76. One of the more controversial provisions of the Act is subsection (3) of section 82.[112] The subsection recognises the old principle that "possession is nine points of the law". Rectification against a registered proprietor who is in possession is thus prohibited, except in certain circumstances. The effect of the subsection is to give substantial protection against defects in the pre-registration title to proprietors in possession who have obtained their title as the result of a transaction for value with a registered proprietor with an absolute title. A first registered proprietor, as we shall see, is not in such a strong position.[113]

Overriding interests

77. The prima facie prohibition on rectification against a registered proprietor who is in possession does not apply where rectification is "for the purpose of giving effect to an overriding interest". Strictly speaking, that seems an inappropriate expression because the interest of the registered proprietor is always subject to subsisting overriding interests,[114] and it is of the nature of an overriding interest that it is effective without entry on the register. Indeed, it ceases to be an overriding interest if it is entered on the register. Nevertheless, it is clearly desirable that any matter or interest (other than those of a trivial nature) which can constitute an overriding interest should so far as practicable be entered on the register and if the register is "rectified" for that purpose it is all to the good.

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112. The text of s.82 is reproduced in Appendix D.

113. See para. 84.

114. Unless the contrary is expressed on the register, (s.70 (1)).

78. We now turn to deal with the substance of subsection (3) of section 82.[115] The subsection preserves the last vestiges of the concept that an absolute registered title is indefeasible in that it gives prima facie protection to a proprietor in possession against having the register rectified against him. At the outset it must be pointed out that there is no special definition of "possession" and it must, therefore, be a matter for speculation as to what exactly that word means in this context.[116] We suggest that it was probably intended to mean something nearer occupation than the ownership of a proprietary right,[117] and the wording of subsection (4) of section 82[118] seems to support this construction. Presumably the provision was originally introduced to ensure that a registered proprietor whose interest was coupled with occupation should be given a privileged position recognising that in such a case money would not be an adequate recompense for the loss of such an interest. The 1919 Committee on the Transfer of Land (the Scott Committee), on whose recommendations the subsection is based, said:-[119]

> "In our opinion, the title of the person in possession of the land should, subject to interests overriding the register, as a general rule be maintained, unless he was responsible for the mistake in the register, or claims directly under a void disposition, or claims otherwise than for value under a disposition to a predecessor which was void, or unless in any particular case it would be unjust not to rectify the register against him."

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115. The text of s. 82 is reproduced in Appendix D.

116. In the Act, unless the context otherwise requires "possession" includes receipt of rents and profits or the right to receive the same, if any. (s.3(xviii)).

117. See (1968) 84 L.Q.R. 528 (Cretney and Dworkin) p.539. But see Curtis and Ruoff Registered Conveyancing 2nd. ed. pp. 889, 890.

118. "Where a person is in possession of registered land in right of a minor interest, he shall....be deemed to be in possession as agent for the proprietor."

119. (1919) Cmd. 424 p.17.

79. Subsection (3) which gives effect to the Committee's recommendation, has been construed in such a way that its apparent purpose has been largely frustrated so far as a first registered proprietor is concerned. The problem arises in relation to the three cases which are set out as exceptions to the general rule that the register cannot be rectified against a proprietor in possession (save for the purpose of recording overriding interests); and in relation to these cases Wynn-Parry J. in Re 139 Deptford High Street[120] said:-

> "..... it appears to me that, if any of the conditions contained in s. 82(3)(a), (b) and (c) respectively is fulfilled, the court ought to exercise its jurisdiction to rectify."

As has been pointed out elsewhere,[121] the fulfilment of any of the three conditions merely deprives the proprietor in possession of the special protection against rectification afforded by the subsection, thus leaving it open to the Court (or the Chief Land Registrar) to rectify the register in the exercise of a discretionary jurisdiction. But Wynn-Parry J. appears to have considered that the fulfilment of any of the conditions goes further, and actually dictates the manner in which that discretion should be exercised. He gave no reason for taking this view; and while we are bound to agree that rectification may be a foregone conclusion in the last of the three cases ("...unjust not to rectify..."), it is by no means clear that the Court's discretion should always be exercised in favour of the applicant for rectification in the other cases.[122] This is perhaps borne out by Re Sea View

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120. [1951] Ch. 884 at 889.

121. (1968) 84 L.Q.R. 528 (Cretney and Dworkin) p. 540.

122. It might however be argued that s. 82 (3)(a) and (b) should be regarded as specific instances in which it would be "unjust not to rectify" and that (c) covers instances in which it would be unjust not to rectify "for any other reason".

Gardens, Claridge v. Tingey[123] in which Pennycuick J. indicated, although he did not actually decide, that there might be cases where, notwithstanding the fact that the proprietor in possession had "contributed to the mistake", rectification would not be ordered. The judge said:-

> "On the other hand, it seems to me that there must certainly be circumstances in which it would not be just to make an order for rectification. I am not referring now to a mere matter of hardship. What I have in mind is the type of case in which the true owner, having learnt that the registered proprietor is doing work on the land, stands by and allows him to do the work before he intervenes with an application for rectification. In an extreme case of that kind, it is, I think abundantly clear that it would not be just to make an order for rectification."

In view, however, of suggestions we make later in this Paper that the subsection should be recast, it seems unnecessary to discuss the point further. In the next paragraphs we consider each of the statutory exceptions (i.e. those contained in paragraphs (a), (b) and (c) of subsection (3)) in detail.

Paragraph (a). Contributing to the mistake

> "(a) Unless such proprietor is a party or privy or has caused or substantially contributed, by his act, neglect or default, to the fraud, mistake or omission in consequence of which such rectification is sought;"

80. The intention underlying this paragraph seems clear. The privileged position of a proprietor in possession will be lost if the circumstances which resulted in the claim for rectification were his fault. That is clear from the inclusion of the words "neglect" "default" and "fraud". How far a non-negligent or non-fraudulent act was intended to be covered by

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123. [1966] 3 All E.R. 935.

the paragraph is not clear, but the introduction into it of the words "his act" has led the Court to hold that an applicant for first registration substantially contributes to a mistake (or omission) merely by lodging a document which is defective.[124] Since a mistake or omission in the register, unless solely due to a mistake in the Registry, will almost inevitably have been caused by a defect in a document lodged on first registration, this construction of paragraph (a) seems to have deprived a first registered proprietor, in most cases, of the protection the subsection was, clearly, meant to give to him. Furthermore, as we have already pointed out, if paragraph (a) applies, the Court has held that it ought to order rectification. That this may produce a result that may not be just was recognised by Wynn-Parry J. in one of the few cases on the paragraph that have come before the Court. In his judgment in the Deptford case[125] he said:-

> "Furthermore, had I not felt constrained to hold that there has been a mistake contributed to by the respondent within section 82, subsection (3)(a) I should not have been prepared to rectify the register under section 82 subsection (3)(c)[126]...weighing all the relevant circumstances if I had to decide the case under section 82 subsection (3)(c), I should have taken the view that the applicants would have been properly protected by their right to claim an indemnity under section 83 subsection (6)."

81. It is clearly unfortunate that if paragraph (a) applies, the Court should feel bound to hold that rectification must be ordered although it is of the opinion that the applicant would be properly protected by a payment of compensation for his loss. We do not think that a proprietor in possession

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124. Chowood Ltd. v. Lyall [1930] 2 Ch. 156, Re 139 Deptford High Street [1951] Ch. 884.

125. [1951] Ch. 884 at 892.

126. para. 3(c) states "unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him

should automatically forfeit the protection of subsection (3) if he has been neither fraudulent nor negligent. If no other amendment were to be made to the subsection therefore, we think that at least the word "act" should be deleted. In this connection, it should be noted that the Land Registration and Land Charges Act 1971[127] has substituted the words "lack of proper care" for the words "act, neglect or default" which were introduced into subsection (5)(a) of section 83 by the 1966 Act. We suggest that similar wording might be adopted in paragraph (a) of subsection (3) of section 82 with the retention of the existing reference to fraud. A proprietor would then be automatically deprived of the protection of the subsection under paragraph (a) only if he is either fraudulent or has not exercised proper care. In paragraphs 87 and 88 below, we suggest a reformulation of subsections (1) and (3) which takes this suggestion into account.

Paragraph (b). Void dispositions

> "(b) Unless the immediate disposition to him was void, or the disposition to any person through whom he claims otherwise than for valuable consideration was void;"

82. It is not entirely clear what is meant by the word "void" for the purposes of paragraph (b). Does a void disposition include one which is voidable or one which is good in some respects but invalid in others? What is clear is that it covers forged dispositions.[128]

83. Where the disposition is a forgery, the paragraph does not distinguish between those cases where the proprietor of the title knows the document is a forgery and those where he does not. If, however, he knows that the document is a forgery, it is likely that paragraph (a) of subsection (3)[129] will apply, and that the proprietor will, as seems just, for-

127. s. 3.

128. In re Deptford High Street [1951] Ch. 884 at 892.

129. See para. 80 above.

feit the privileged position which possession gives to him. Whether, where the proprietor is innocent of the forgery, he should automatically forfeit that position, seems to us to be open to doubt. It ought, we suggest, to depend on the circumstances. Take the case, for example, of a man who innocently purchases a site for a house under a forged conveyance. He becomes the registered proprietor with an absolute title of the property and then spends money on it by building a house in which he resides. Some years later the true owner of the land turns up and applies to have the register rectified against the proprietor. As the law now stands, the Court might, following the Deptford case, feel itself bound to order rectification and to leave the proprietor to obtain indemnity. In such a case the registered proprietor may well have lost something for which money may not be adequate compensation, whereas a money payment to the true owner might have been an adequate recompense for him.

84. The paragraph also demonstrates how a subsequent proprietor for value is in a far stronger position than the proprietor who took under a void disposition. Thus, if in the example given in paragraph 83 above, the proprietor had sold the property, the purchaser on being registered would not have lost his protection under paragraph (b) because the immediate disposition to him was not void. The Court would then, if neither paragraph (a) nor (b) of subsection (3) applied, be able to decide under paragraph (c), whether it would be unjust not to rectify the register.

Paragraph (c). Other reasons for rectification

> "(c) Unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him."

85. In paragraph 80 above, we have quoted from a passage in a judgment of Wynn-Parry J. where he clearly felt that he would like to have decided the case under paragraph (c) of

subsection (3) but (because paragraph (a) applied), could not do so. We have, in discussing paragraph (b), given an example of a case in which justice seems to require that the Court ought, if it thought fit, to be able to decide it under paragraph (c). No comment seems necessary on the detail of that paragraph, the wording of which is clear. Below, however, we discuss a proposal for reformulating subsections (1) and (3) generally which would, in effect, give greater efficacy to the principle which is contained in paragraph (c).

Subsections (1) and (3) of section 82 - Proposals for reform

86. Our present view is that subsection (3) of section 82 is not satisfactory. Our main criticisms may be summarised as follows:-

(a) It is uncertain what is meant by the expression "proprietor in possession" (see paragraph 78 above).

(b) Although the purpose of the subsection is to afford prima facie protection against rectification, a registered proprietor (and especially the first such proprietor) is, as exception (a) is now worded, liable to lose that protection through no fault of his own (see paragraph 80).

(c) Further, the Court has shown itself inclined to construe the exceptions in such a way that if any of them applies its discretion in the matter of rectification should be exercised against the registered proprietor, and this does not necessari produce a just result (see paragraphs 80 and 83).

(d) We see no need to set out the present exception (b). If the proprietor knew, or should have known, that the disposition to him was void, the case should fall within exception (a); otherwise the case should be considered under exception (c).

87. Rectification of the register for the purpose of recording overriding interests does not affect existing rights and should not be a matter merely of discretion. On the other hand, the register should never be rectified in favour of an applicant who had failed to register an interest or charge which the Act requires to be registered; nor should it be rectified to give effect to any matter which, had the land been unregistered land, would have been a registrable land charge. Subject to those points, we suggest that there should be a discretionary jurisdiction to rectify the register where it is proved:-

(a) that the register does not accurately reflect the title to the land on the supposition that it was not registered land; and

either (b) that the error in the register was caused or substantially contributed to by the registered proprietor's fraud or lack of proper care;

or (c) that in all the circumstances greater injustice would be caused by not rectifying the register than by rectifying it.

88. It seems to us that a provision along the lines just indicated could stand in the place of both subsections (1) and (3) of section 82. We think that condition (a) covers the present contents of subsection (1), without the same risk of omissions: and conditions (b) and (c) correspond to the existing exceptions in subsection (3), with amendments. The reliability of the register would be enhanced because (b)

or (c) would have to be satisfied in every case (and not only where the proprietor is "in possession"); and (b) requires fault on the part of the proprietor to be proved. If the legislation had been in this form, it is clear that Wynn-Parry J. would have been able to decide Re 139 Deptford High Street[130] the other way, as he would have wished.

III Indemnity

The existing provisions

89. The principal statutory provisions as to indemnity are now contained in section 83 of the Act,[131] which incorporates amendments made by the Land Registration and Land Charges Act 1971 ("the 1971 Act"). Under these provisions, there is a right, subject to certain qualifications, to indemnity in three cases:-[132]

(i) Where a person has suffered loss by reason of any rectification of the register under the Act.[133]

(ii) Where an error or omission has occurred in the register, but the register is not rectified, and a person has suffered loss by reason of such error or omission.[134]

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130. [1951] Ch. 884.

131. The text of s. 83 (as now in force) is set out in Appendix D.

132. There are certain other cases, not arising under s. 83, where indemnity may be payable:- viz. under s. 30(2) (charges for securing further advances), s.61 (7) (omission to register creditor's notice or bankruptcy inhibition), s. 77(6) (conversion of possessory into absolute or good leasehold title), s. 110(4) (errors in filed abstracts, copies etc.), s. 113 (inaccuracies in office copies etc.).

133. s. 83 subs. (1) Under subs. (4) a proprietor claiming in good faith under a forged disposition is deemed to have suffered a loss if the register is rectified.

134. ibid. subs. (2)

(iii) Where any person suffers loss by reason of the loss or destruction of any document lodged at the registry for inspection or safe custody or by reason of an error in any official search.[135]

It will be seen that (i) and (ii) give effect to the principle that rectification and indemnity are complementary remedies.

90. There are three cases in which it is expressly provided that indemnity is not payable under section 83 of the Act.[136] They are as follows:-

(i) Where the applicant or a person from whom he derives title (otherwise than under a disposition for valuable consideration which is registered or protected on the register) has caused or substantially contributed to the loss by fraud or lack of proper care.[137]

(ii) On account of any mines and minerals or the right to work and get them unless a note that mines and minerals are included in the title is entered on the register.[138]

(iii) On account of costs incurred in taking or defending any legal proceedings without the consent of the Registrar.[139]

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135. ibid. subs. (3).

136. Cases where indemnity is excluded, not arising under s. 83, are:- under s.42(2) (disclaimer of lease by trustee in bankruptcy) and s.60(2) (charges by companies, not protected on the register).

137. s. 83 subs. (5) para. (a) (as substituted by s.3(1) of the 1971 Act).

138. ibid. para. (b).

139. ibid. para. (c). This para. does not apply to the costs of an application to the Court to determine whether a person is entitled to indemnity or as to its amount. (See 1971 Act s. 2(1)).

91. The indemnity to be paid in respect of the loss of an estate or interest in or charge on land is not necessarily a full indemnity. Under subsection (6) of section 83 where the register is not rectified the amount must not exceed the value of the estate, interest or charge at the time when the error or omission which caused the loss was made.[140] Where the register is rectified the upper limit on the indemnity is the value (if there had been no rectification) of the estate, interest or charge immediately before the time of rectification.[141]

92. Sections 1 and 2 of the 1971 Act which came into force on 1 October 1971,[142] alter the procedure under which indemnity is claimed. Previously claims were paid out of the insurance fund established under the Land Transfer Act 1897. The fund had trustees and payments out of the fund were made by them or on their behalf and, in any claim for indemnity which had to be determined judicially, the trustees were represented by the Attorney-General.[143] Under the 1971 Act[144] the insurance fund has been wound up and indemnity is now payable by the Registrar out of moneys provided by Parliament. Claims must, as before, be made to the Registrar; and he may settle them by agreement.[145] If any question arises as to entitlement to indemnity or as to its amount, the claimant may apply to the Court to have the question determined.[146] In relation to such proceedings, the Chief

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140. s. 83(6) para. (a).

141. ibid. para. (b).

142. Pursuant to the Land Registration and Land Charges Act 1971 (Commencement No. 1) Order 1971. 1971 S.I. No. 1489.

143. As, for example, in A.-G. v. Odell [1906] 2 Ch.47.

144. s. 1.

145. s. 2(5).

146. s. 2(1).

Land Registrar will be a party, but the applicant for indemnity will not be required to pay any costs other than his own, unless the Court considers that the application was unreasonable.[147]

93. Where indemnity is paid for a loss, the Registrar on behalf of the Crown, is entitled to recover the amount paid from any person who has caused or substantially contributed to the loss by his fraud,[148] and the Registrar also is entitled to enforce any express or implied covenant or other right which the person who is indemnified would have been entitled to enforce had he not been indemnified.[149] Under the latter provision the Crown would be able to enforce a claim under express or implied covenants for title given in favour of an applicant for registration.

94. A liability to pay indemnity under the Act is deemed for the purpose of the Limitation Act 1939 to be a simple contract debt, and in the ordinary case it is therefore extinguished after six years from the time when the cause of action arose.[150] The cause of action in relation to a claim for indemnity is deemed to arise when the claimant knows, or but for his own default might have know, of the existence of his claim. Where, however, a claim to indemnity arises in consequence of the registration of an estate with an absolute or good leasehold title, the claim is enforceable, subject to certain exceptions, only if made within six years from the date of registration.[151] This provision gives rise to questions which we discuss in paragraph 110 below.

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147. S. 2(3). s. 83(8) of the Act (as amended by the 1971 Act) (s.2) makes provision for the applicant's costs.

148. s. 83(9).

149. s. 83(10).

150. s. 83(11).

151. ibid. proviso.

Suggestions for reform

The insurance principle

95. We think that it must be right that where the register is rectified, a proprietor suffering loss should prima facie be entitled to indemnity; and conversely that where the register is not rectified prima facie a person thereby suffering loss should be entitled to compensation. If an applicant for indemnity in those circumstances is unsuccessful, it will generally be because he has disqualified himself by reason of his fraud or lack of proper care.[152] Where he has caused or contributed to the loss by his fraud, it is clearly right that the "insurance" of his title should, in effect, be vitiated. On the other hand, where he has merely been careless, should the position be the same? Subject to the point made in paragraph 97, we think, on balance, that the answer is yes. We see no reason why in this field the State should compensate a person for his own carelessness. It might be argued that even if the State did so compensate him, in many cases it would not lose financially having regard to the "recovery" provisions in subsection (10) of section 83, and that if a title is properly insured the State should bear a part of the risk. But the operation of the recovery provisions (since the rights of the State are no stronger than those of the person compensated) is to some extent of a hit and miss character: there may be no effective remedy because, for example, the vendor had not given the full statutory covenants for title. The fact that indemnity is not payable by the State to a careless applicant does not necessarily mean that he has no remedy. He will have none if the carelessness was entirely his own but in appropriate circumstances he may have a remedy against his professional advisers.

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152. s.83 (5)(a) (as amended by the 1971 Act).

96. We have already mentioned that rectification and indemnity are complementary remedies. Thus the pattern of sections 82 and 83 of the Act is that, in principle, an applicant will, if he establishes his case, either succeed in his claim to have the register rectified or will obtain compensation. What does not seem to have been envisaged, however, is that rectification by itself may not be an adequate remedy and that there may conceivably be cases where compensation may be required in addition to rectification. What we have in mind may be demonstrated by taking a somewhat extreme example. Assume that A is the true owner of a piece of freehold unregistered land on which there are a number of valuable trees. B in good faith purchases land from C the title to which purports to include that part of A's land on which the trees stand. The deeds have, however, been forged by C who later becomes untraceable. B registers his title at the Registry and obtains an absolute title. Subsequently he cuts down and sells the trees and, too late, A finds out what has happened. A succeeds in an application to rectify the register to restore his title. Under the present law that exhausts A's effective remedies. He will not be entitled under section 83 to any compensation from the State although the land may be worth less, as the result of the trees having been cut down, than it was when B was registered; nor has A any right of action in tort against B, because at the material time B was the registered proprietor of the land and was accordingly entitled to cut down the trees. It may, perhaps, be said that A ought to have applied, not for rectification, but rather for indemnity only, and might then have received full compensation. That, however, could possibly be unfair to A. The land on which the trees stood may be an essential part of his estate and he may think that he would rather have it back, without the trees, than let it go. It seems to us that in appropriate cases a successful applicant for rectification should be entitled to look to the State for indemnity in

addition,[153] especially where it is the Act itself which has effectively deprived him of the right to recover consequential loss (not made good by rectification) from any other person.

Compensation where an applicant has been careless

97. An applicant for indemnity who is disqualified because he has caused or substantially contributed to the loss by lack of proper care is wholly disqualified, even if, in fact, some other party or the Registry were partly to blame. At an early stage in our study of this topic it seemed to us, and it has since been suggested by others,[154] that this feature of the indemnity provisions in section 83 of the Act is not altogether satisfactory. If a person is only partly to blame, and he is innocent of fraud, it does not seem right that he should be wholly debarred from obtaining compensation; fairness would seem to demand rather that compensation should be reduced having regard to his share of responsibility for the loss.

98. On the other hand, the introduction of provisions analogous to those contained in the Law Reform (Contributory Negligence) Act 1945 would, we fear, have certain - possibly substantial - disadvantages from a practical point of view. At present, we understand that the great majority of claims for indemnity are for quite small sums of money and can be settled without a great deal of difficulty or incidental cost. This could very well change if contributory negligence were to become a factor in determining indemnity claims. Where there is a suggestion that the Registry may have been partly

153. cf. the position where a chattel has been converted. In an action for detinue, the Court may order the delivery up of the chattel together with consequential damages. See Law Reform Committee's 18th. Report (Conversion and Detinue) (1971) Cmnd. 4774 paras. 88 to 97.

154. (1968) 84 L.Q.R. 555 (Cretney and Dworkin).

to blame for the loss, the Chief Land Registrar may very well feel that it is only right that the claim should be settled by the Court rather than by himself. The risk of incurring litigation costs would doubtless deter many applicants with small claims to indemnity from making their claims at all, so that a change in the law would not help them. Moreover, the fact that claims would be bound to become more difficult to determine could increase the expense to the Registry in dealing with them - expense which in the long run would fall on the users of the Registry generally.

99. Despite the disadvantages which we have mentioned in the preceding paragraph, our present view is that, on balance, they are probably not so great that something which seems to be clearly right in principle should not be implemented. The views of others would be particularly welcome on this matter, because we feel it is one of great difficulty.

Indemnity and overriding interests

100. Although the Act does not expressly say so, indemnity is not payable where the register is rectified to give effect to an overriding interest. The reason for this is that, since all registered land is subject to overriding interests, a proprietor cannot be said to suffer loss if the register is rectified to give effect to such an interest.[155] Theoretically, at least, this must be right, but it has been suggested to us that the principle that no compensation should be payable in respect of a rectification to give effect to an overriding interest should not be too rigidly applied.

101. Our present view is that the law, as it now stands, is right and should not be amended in this respect. We have discussed overriding interests generally in our Second Paper[156] and have there put forward provisional proposals which would

155. Re Chowood's Registered Land [1933] Ch.574.

156. Working Paper No. 37, Part B.

if implemented, reduce their number to some extent. In particular, we have suggested that rights of occupiers[157] as overriding interests should be substantially cut down. Our suggestion, if implemented, could have the consequential effect of permitting indemnity to be paid in some exceptional cases where indemnity could not have been paid under the present law. The defendants in Hodgson v. Marks and another,[158] for example, would, prima facie, have had a claim for indemnity if the law had then been amended as we have suggested.[159]

102. Although a greater number of applicants might be prima facie entitled to indemnity if the number of overriding interests were to be cut down, it should be borne in mind that the conduct of the applicant would be relevant in deciding whether or not his claim succeeded. At present, for example, a registered proprietor will not be entitled to indemnity if part of the land is removed from his title on the application of a person whose land was erroneously included in the title and who was at all material times in actual occupation of the land in question.[160] That is because the rights of that person when coupled with actual occupation now constitutes an overriding interest.[161] If the law were to be changed so that such rights would no longer be an overriding interests (as we have suggested in our Second Paper), a registered proprietor against whom the register was rectified to give effect to that interest would then prima facie have a right to indemnity; but his claim to indemnity would fail if he

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157. Under s. 70(1) (g).

158. [1971] Ch. 892. The facts are stated in para. 71 above.

159. It is perhaps possible that the second defendant (the Building Society), might not have lost its charge. cf. Re Leighton's Conveyance [1936] 1 All E.R. 667.

160. See in re Boyle's Claim [1961] 1 W.L.R. 339.

161. Under s. 70(1)(g).

had not exercised proper care.[162] He would not, we suggest, have exercised proper care if a third party were openly in occupation of part of the land when he purchased it and no enquiry was made as to why the third party was there. (In our Second Paper,[163] we also suggested that an amendment to the Act might be necessary to prevent a careless purchaser from obtaining indemnity in such circumstances. But it now seems that the "lack of proper care" provision introduced by the 1971 Act is sufficient).

The assessment of indemnity

103. The Act gives no precise guide as to the manner in which indemnity is to be calculated. Presumably, therefore, it must have been intended that indemnity should be calculated in accordance with general principles. The formula which is used in each of subsections (1) (2) and (3) of section 83, is the same: the person who suffers loss in any of the specified sets of circumstances shall be entitled to be indemnified. "Loss" is not defined and consequential loss to him (that is to say, loss additional to the value of any estate, interest or charge lost as a result of rectification, or refusal to rectify) is not, in terms, excluded. Where indemnity is paid "in respect of the loss of an estate or interest or charge on land" the amount of the payment is limited by subsection (6). Under paragraph (a) of that subsection, the payment is not to exceed, where the register is not rectified, the value of the estate, interest or charge at the time when the error or omission which caused the loss was made. In practice, that will be the value at the date of the erroneous registration. On the other hand, where the

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162. s. 83(5)(a) (as amended by the 1971 Act). If, as suggested in para. 99 above, a "contributory negligence" principle were introduced, this provision would be subject to it and the registered proprietor's claim might not, accordingly, fail altogether.

163. Para. 77.

register is rectified, the payment must not exceed the value of the estate, interest or charge at the time of rectification.[164] If consequential loss can be the subject of indemnity[165] no limits are prescribed for the amount of indemnity that can be awarded in respect of it.

104. The effect of the provisions outlined above, leaving aside the question of costs, seems to be that the assessment of indemnity in respect of the loss of an estate, interest or charge on land has to be made in two stages. First the loss must be assessed in accordance with general principles. Secondly the resulting figure must, if in excess of the limits laid down in section 83(6), be cut down accordingly. To the relevant figure must be added the amount of any consequential loss awarded.

105. Subsection (6) of section 83 has been criticized as being capable, where paragraph (a) applies, of producing unfair results. Suppose that X, through no fault of his (or of the Registry), is wrongly registered as the proprietor of a piece of land belonging to Y. At the time of registration the land was worth £500. The error is not discovered for five years, by which time the land is worth £1500. If rectification of the register is refused, then under paragraph (a) of subsection (6) the indemnity payable to the true owner, Y, is restricted to the value of the land at the time of registration, £500: whereas if rectification had been ordered he would have received back the land, then worth £1500, and the dispossessed registered proprietor X could be paid indemnity up to the figure of £1500 for the loss of his regis-

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164. Under para. (b) of s. 83(6).

165. "Loss" in sub-s.(3) of s. 83 is plainly not limited to the particular head of loss referred to in sub-s. (6); and we see no reason why "loss" in sub-s.s.(1) and (2) should be narrower in concept than it is in sub-s.(3).

tered estate. Consideration of problems of this kind has led us to question whether it is right for the Act to contain any express restriction on the amount of indemnity payable for the loss of an estate, interest or charge on land. In principle, it seems to us that if it is right that the State should give persons prejudiced by a wrong registration an indemnity for the loss they suffer, then the indemnity ought not to be calculated on a basis that is arbitrarily restricted. It would, we think, be right, however, for it to be made clear that, in accordance with ordinary principles of assessment of damages, indemnity might be limited where the applicant has not taken steps to mitigate his loss or has stood by in the hope that his loss might increase.

106. The origin of subsection (6) of section 83 of the Act is a recommendation of the 1919 (Scott) Committee on Transfer of Land in England and Wales. Their report[166] said:-

> "We do not think that compensation should be given to a party ruled out by registration in respect of the value of the land as it stood at the time of first registration. After a comparatively short period, it may become impossible to ascertain the value of the land at the time of first registration. Nor do we think that in all cases it would be just or desirable to select that date.
>
> In our opinion, the compensation should not exceed:-
>
> (a) Where the register is not rectified, the value of the estate, interest or charge when the error or omission which caused the loss was made:
>
> (b) in cases where the register is rectified, the value (if there had been no rectification) of the estate, interest or charge immediately before the date of rectification."

The Committee's recommendation was thus carried, almost word for word, into subsection (6) of the Act.

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166. (1919) Cmd. 424 p.17.

107. Although it seems that the Committee had doubts as to whether it was desirable or possible to calculate compensation on the basis of the value of the land at the time of the wrongful registration, their recommendation seems to have precisely that effect in cases where rectification is refused. The Committee gave no detailed reasons for advocating the formula which they devised. It was doubtless accepted at the time because it made sense in conditions of relatively stable land values and a true owner who failed to obtain rectification would not be prejudiced by receiving a sum of money equal to the value of the land at the date of the erroneous registration. If the value of the land had gone up since the error was made, it is probable that the rise would have been due not to inflation but to improvements effected by the registered proprietor, and in those circumstances he would be prejudiced by taking the date of his registration as the relevant valuation date. It seems that the Committee feared that, unless express provisions were made, the indemnity payable to a registered proprietor against whom the register had been rectified would always be restricted to the value of the land at the earlier date; and that their formula, although expressed in terms of limits ("....shall not exceed"), was intended in substance to remove any such restriction on the measure of indemnity payable to a registered proprietor. Conditions in the property market have since changed very much, and the formula, in many cases, creates an artificial restriction where rectification is refused. In those circumstances we think that it is consistent with the Committee's own general approach to the matter that the formula should be altered or dispensed with.

108. In paragraph (c) of the proviso to section 13 of the Act, the Registrar is permitted to approve a title that may be open to objection if, in his opinion, the title is one "the holding under which will not be disturbed". We understand that this provision is liberally interpreted by the Registry and that many titles which are subject to technical defects

are nevertheless registered as absolute. The provision in effect authorises the Registrar to take certain risks in registering defective titles notwithstanding that this may increase the possibility of claims for indemnity under section 83. If the limits prescribed under subsection (6) of section 83 were to be removed, it would be necessary to consider whether the Registrar might feel obliged to adopt a more restrictive interpretation of the proviso to section 13 and so lessen the number of technically defective titles which he is prepared to register as absolute. The matter is entirely one for the Registrar's discretion and it is right that he should be mindful of protecting public funds. It is necessary to consider separately what effect the removal of the limit of indemnity would have on public funds (a) in those cases when the register is rectified and (b) in those when it is not rectified. In the former it seems that there would be no appreciable change because the "limit" prescribed (in section 83(6) (b)) is normally the same as the amount of indemnity which would be payable without reference to the limit. In the latter case there would be a change where the value of the estate, interest or charge had risen since the original error or omission occurred. Although cases of payment of indemnity for non-rectification may, perhaps, arise more often than those for rectification, the number of successful claims over the years has been small, and we doubt whether removal of the limits (which would not affect the number of cases) would, even in a rising market, have the effect of increasing to any substantial extent the total amount paid out by the Land Registry under the indemnity provisions.

109. As we have indicated, we do not think that the Act should prescribe any arbitrary limitation on the amount of indemnity payments. The question that needs to be resolved, therefore, is whether any yardstick or guidelines should be laid down in the Act as to the manner in which indemnity payments should be assessed. No such yardstick or guidelines are now laid down and we see no compelling reason for this

to be changed, but we would welcome views on this.

Limitation

110. The law relating to limitation of actions generally is currently under consideration by the Law Reform Committee and we think that it would be inappropriate for us to make any positive suggestions at this stage in relation to the limitation of claims for indemnity under the Act. We do, however, propose to draw that Committee's attention to three matters which seem to deserve consideration. They are:-

(i) the absence of any express period of limitatio for claims to rectification;[167]

(ii) the restriction (contained in the proviso to section 83 (11)) of a claim to indemnity arisi in consequence of the registration of an estat in land with an absolute or good leasehold title, to six years from the date of registration. This is much the commonest case for a claim for indemnity. Although the period is extended in certain cases, time prima facie runs from the date of the (erroneous) registration, whether the claimant knew about the registration or not. In the result, the true owner may have no remedy at all after six year being defeated by the combined effect of secti 82 (3) (restrictions on rectification where th proprietor is in possession) and the proviso t section 83 (11); and

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167. In fact, there may often be an effective 12-year period, since after that space of time possession of the land by the registered proprietor will have barred the right on which the claimant's case for rectification is based.

(iii) the provision of a six year period, not only in the cases falling within the proviso to section 83 (11), but also in all other cases of indemnity. It may sometimes be right to treat a claim for indemnity in the same way as a simple contract debt, but such claims are likely to be alternative to a claim to "recover" by rectification land which the claimant has "lost" by the registration of a third party. In such circumstances a claim for indemnity would seem to be analogous rather to a claim for damages in a real property action, and a 12-year period might seem to be more appropriate.

PART D. SUMMARY OF PROVISIONAL CONCLUSIONS

As to identity and boundaries

(Part B, Paragraphs 1 to 57)

1. Registration with general boundaries should continue for all cases unless a specific application to "fix" boundaries is granted. (Para. 22).

2. The existing procedure for fixing boundaries at the request and expense of the applicant should be retained, although it is little used. (Para. 36).

3. Where the evidence is available, greater use should be made of the practice of including in a conveyance (or transfer) leading to first registration a declaration as to the ownership of boundary features. (Para. 44).

4. Some of the difficulties in relation to plans which may arise after an application for registration has been made might be avoided if more use were to be made of the available search procedures. (Paras. 49 to 55).

As to rectification of the register and indemnity

(Part C, Paragraphs 58 - 110)

1. The grounds on which the register may be rectified, wide though they are, may not be sufficiently comprehensive. (Para. 70).

2. The general principle should be that the register may be rectified where it does not accurately reflect the title to the land on the supposition that the title to the land was not registered; save that rectification should not

be available to give effect to any estate or interest in the land which the Act requires to be registered. (Para. 73).

3. It is consistent with that general principle that it should not be possible, by rectification against the registered proprietor, to give effect to an interest which was not protected by notice on the register when the proprietor purchased the land, being an interest which (had the land not been registered land) should for its protection have been registered as a land charge under the provisions of the Land Charges Act 1925. (Para. 73).

4. Subsection (3) of Section 82, the general purpose of which is to prevent the register from being too freely rectified to the detriment of the registered proprietor, is thought to be defective in several respects. In particular:-

(a) The subsection applies only where the proprietor is "in possession" and the meaning of that expression in the context is doubtful. (Para. 78).

(b) Although rectification is a discretionary remedy, it has been held by the Court that rectification should always be ordered if one of the exceptions set out in the subsection applies and the special protection afforded to the registered proprietor is accordingly lost. (Para. 79); and

(c) The proprietor's protection may be lost without fault on his part. (Paras. 80 and 83).

5. It is suggested that subsections (1) and (3) of section 82 should be redrafted with a view, first, to laying greater emphasis on the principles upon which rectification

should be permitted (see 2 above) and, secondly, to reinforcing the position of the registered proprietor by eliminating the defects referred to in 4 above. (Paras. 87 and 88).

6. Where rectification by itself would not be an adequate remedy the Court should have power, in appropriate cases, to award indemnity to an applicant who has succeeded in obtaining rectification. (Para. 96).

7. It is for consideration that indemnity should not be wholly disallowed where an applicant is only partly to blame for the loss he has suffered. (Paras. 98 and 99).

8. The present law that indemnity should not be allowed where the register has been rectified to give effect to an overriding interest should be retained. (Para. 101).

9. Subsection (6) of section 83 of the Act (which restricts the amount of a payment of indemnity) should be repealed. The Act should not prescribe any specific limit on such a payment. Where an applicant is entitled to an indemnity, it should not be calculated on an artificially restricted basis. (Para. 105).

10. We propose to draw the attention of the Law Reform Committee (now considering the law of limitation of actions) to certain matters in relation to claims for rectification and indemnity under the Act. (Para. 110).

APPENDIX A

REDUCED FACSIMILE OF REGISTER IN LAND CERTIFICATE

H.M. LAND REGISTRY

TITLE NUMBER 00002

This register consists of 2 *pages*

A. PROPERTY REGISTER

containing the description of the registered land and the estate comprised in the Title

ADMINISTRATIVE AREA (County, County Borough, etc.)	PARISH OR PLACE
BLANKSHIRE	BROXMORE

The Freehold land shown and edged with red on the plan of the above Title filed at the Registry registered on 12 October 1934 known as 2 Moon Street.

B. PROPRIETORSHIP REGISTER

stating nature of the Title, name, address and description of the proprietor of the land and any entries affecting the right of disposal thereof

TITLE ABSOLUTE

Entry number	Proprietor, etc.	Application number and remarks
1.	JOHN SMITH, Printer and WILLIAM BROWN, Engineer, both of 4 Moon Street, Broxmore, Blankshire, registered on 1 February 1968.	Price paid £900.
2.	RESTRICTION registered on 1 February 1968:-No disposition by one proprietor of the land (being the survivor of joint proprietors and not being a trust corporation) under which capitel money arises is to be registered except under an order of the registrar or of the Court.	
3.	CAUTION in favour of Jesse Turnbull of 30 Park Way, Torquay, Devon, Electrical Engineer, registered on 20 February 1968.	4563/68

Any entries struck through in red are no longer subsisting

Dmd. 65518 10000 7/67 W. & R. W. Ltd.

APPENDIX A (Contd.)

REDUCED FACSIMILE OF REGISTER IN LAND CERTIFICATE—*continued*

C. CHARGES REGISTER

containing charges, incumbrances, etc., adversely affecting the land and registered dealings therewith

TITLE NUMBER 00002

The date at the beginning of each entry is the date on which the entry was made on this edition of the register.	Application number and remarks
February 1968-A Conveyance of the land in this title dated 30 September 1934 and made between (1) Mary Brown (Vendor) and (2) Harold Robins (Purchaser) contains the following covenants:- "The Purchaser hereby covenants with the Vendor for the benefit of her adjoining land known as 27, 29, 31, 33 and 35 Cabot Road to observe and perform the stipulations and conditions contained in the Schedule hereto. THE SCHEDULE before referred to 1. No building to be erected on the land shall be used other than as a private dwellinghouse. 2. No building to be erected as aforesaid shall be converted into or used as flats, maisonettes or separate tenements or as a boarding house. 3. The garden ground of the premises shall at all times be kept in neat and proper order and condition and shall not be converted to any other use whatsoever. 4. Nothing shall be done or permitted on the premises which may be a nuisance or annoyance to the adjoining houses or to the neighbourhood."	
February 1968-LEASE dated 25 July 1935 to Charles Jones for 99 years from 24 June 1935 at the rent of £45.	Lessee's title registered under 00003
February 1968-NOTICE of Deposit of Land Certificate with Mid Town Bank Limited of 2 High Street, Broxmore, Blankshire, registered on 1 February 1968.	3212/68

Binding Margin

Any entries struck through in red are no longer subsisting

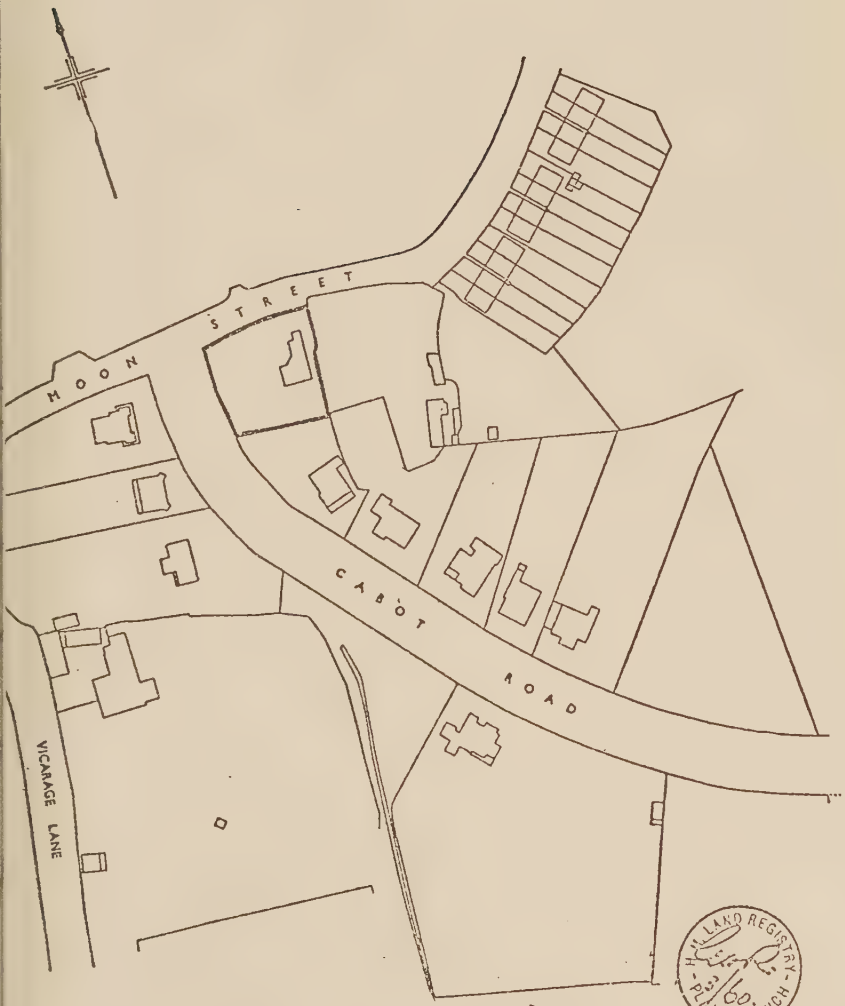
REDUCED FACSIMILE OF PLAN IN LAND CERTIFICATE

H. M. LAND REGISTRY

NATIONAL GRID PLAN SF 6205 SECTION C
(BLANKSHIRE)

Scale 1/1250

BROXMORE PARISH



H.M. LAND REGISTRY
160.
PLANS BRANCH

Title No. 00002

APPENDIX B

(Practice Notes relevant to identity and boundaries.)

No.	5.	Filed Plan-Colouring.
"	6.	Attachment of Plan on Conveyance or Transfer to Land Certificate.
"	12.	Filed Plan - Field numbers and areas.
"	13.	Boundaries - "Hedge and ditch" rule.
"	27.	Registration with general boundaries.
"	29.	Colour References on Filed Plans
"	34.	Covenants and Declarations as to Ownership of Fences: "T" Marks.
"	42.	Developing Building Estates: Preliminary arrangements with the vendor.*
"	43.	Developing Building Estates: Verifications and searches by purchasers.*
"	45.	Plans "for the purpose of identification only".
"	46.	Plans of flats.
"	51.	Official Search of Filed Plan: (C.146 (Building Estates) Procedure).
"	52.	Metrication.
"	59.	Boundary discrepancies on leasehold building estates.
"	60.	Official searches of the public index map - supply of plan to searcher.

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* Incorporated in Land Registry Practice Leaflet No.7.

RELEVANT PRACTICE NOTES.

12. Filed Plan—Field numbers and areas

Field numbers and areas are not shown on the filed plan. The reasons why the Chief Land Registrar will not agree to this being done are as follows:—

(*a*) A survey over the whole of the country is being carried out by the Ordnance Survey on the National Grid. This will introduce completely new co-ordinates, which will render obsolete the field numbers shown on existing ordnance survey maps.

(*b*) The parcels shown on the 6-inch ordnance maps do not contain area measurements and these maps may be used in case of mountain or other undeveloped land.

(*c*) The area measurements shown on one edition of the ordnance survey maps differ from those shown on another edition. Areas stated in deeds are sometimes inaccurate, but any area measurements shown on the filed plan would naturally be assumed to be correct.

(*d*) For field numbers and areas to be shown, the Land Registry would have to consider not only the area measurement shown on a parcel in the ordnance survey, but also the extent of a part of that parcel, where it has been sub-divided. In such a case there might not even be any physical boundaries.

13. Boundaries—"Hedge and ditch" rule

The boundaries shown on the filed plan or general map are only general boundaries and follow the ordnance survey map through the centres of hedges. In the case of agricultural land, this is frequently incorrect, having regard to the "hedge and ditch" rule. The explanation of the Registry's practice is to be found in Rule 278, in cases where the boundaries have not been fixed.*

34. Covenants and Declarations as to Ownership of Fences: "T" marks

It is the practice of the Registry to make an entry on the register in respect of a declaration as to the ownership of fences and other boundaries contained in a transfer of registered land. A positive covenant to erect or maintain a fence is not entered directly on the register but particulars of positive covenants in transfers are sewn up in the land certificate. (See Practice Note 21).

If a conveyance or transfer contains restrictive covenants intermingled with positive covenants relating to the maintenance of boundaries and the covenants are set out in the register, then the "T" marks referred to in the deed will also be shown on the filed plan, or described by a marginal note in the register. If the covenants are not so set out, an office copy of the deed, including its plan, will be bound into the land certificate.

"T" marks may be shown on a deed plan where there is no covenant, declaration of ownership or other reference to them in the body of the deed and their presence is sometimes relied upon as evidence of the ownership of boundary structures. Whatever convention there may be as to the meaning of such "T" marks, it appears that they have no legal significance and for that reason alone it was not the practice, prior to 1962, to reproduce them on the filed plan. Since then, however, the Chief Land Registrar, in deference to the express wishes of solicitors, has agreed that even

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* For further information and as to the history of this rule, see paragraph 45 of the Report of the Royal Commissioners (1870) appointed to inquire into the operation of the Land Transfer Act; the Fourth Report of the Acquisition and Valuation of Land Committee (the Scott Report, 1919), page 18, and the article in *Current Legal Problems*, 1953 (Stevens), entitled "The State and Title to Land".

when there is no fencing covenant or other provision, " T " marks shown on a deed plan will be reproduced on the filed plan in the following circumstances :—

1. The applicant for first registration must specially request this to be done because he regards it as important in the interests of his client.

2. The " T " marks will be those shown on the plan to the deed inducing first registration or, if there is no plan on that deed, in the latest preceding deed containing a plan of the land being registered.

3. A note will be added to the filed plan that " The ' T ' marks were reproduced from the plan on a deed dated . . . but are not otherwise referred to in that deed."

(9) Where indemnity is paid for a loss, the registrar, on behalf of the Crown, shall be entitled to recover the amount paid from any person who has caused or substantially contributed to the loss by his fraud.

(10) The registrar shall be entitled to enforce, on behalf of the Crown, any express or implied covenant or other right which the person who is indemnified would have been entitled to enforce in relation to the matter in respect of which indemnity has been paid.

(11) A liability to pay indemnity under this Act shall be deemed a simple contract debt; and for the purposes of the Limitation Act, 1623, the cause of action shall be deemed to arise at the time when the claimant knows, or but for his own default might have known, of the existence of his claim:

Provided that, when a claim to indemnity arises in consequence of the registration of an estate in land with an absolute or good leasehold title, the claim shall be enforceable only if made within six years from the date of such registration, except in the following cases:—

(*a*) Where at the date of registration the person interested is an infant, the claim by him may be made within six years from the time he attains full age;

(*b*) In the case of settled land, or land held on trust for sale, a claim by a person interested in remainder or reversion, may be made within six years from the time when his interest falls into possession;

(*c*) Where a claim arises in respect of a restrictive covenant or agreement affecting freehold land which by reason of notice or the registration of a land charge or otherwise was binding on the first proprietor at the time of first registration, the claim shall only be enforceable within six years from the breach of the covenant or agreement;

(*d*) Where any person interested is entitled as a proprietor of a charge or as a mortgagee protected by a caution in the specially prescribed form, the claim by him may be made within six years from the last payment in respect of principal or interest.

(12) This section applies to the Crown in like manner as it applies to a private person.